

APPENDIX.

A convention of the people of Virginia met in the City of Wheeling on Thursday, June 13th, 1861, and on the 20th day of August, 1861, this convention adopted an ordinance entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State."

This ordinance provided for an election by the voters of certain counties therein named upon the question whether the new state should be formed or not and also for the selection of delegates to a constitutional convention which was to be held, if a majority of the votes cast therein was in favor of the new State. The ninth and tenth sections of this ordinance are as follows:

"9. The new state shall take upon itself a just proportion of the public debt of the commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period. All private rights and interests in lands within the proposed state, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in the state of Virginia.

"The lands within the proposed state, of non-resident proprietors, shall not in any case be taxed higher than the lands of residents therein. No grants of lands or land warrants, issued by the proposed state, shall interfere with any warrant issued from the land office of Virginia prior to the 17th day of April last, which shall be located on lands within the proposed state now liable thereto."

"10. When the general assembly shall give its consent to the formation of such new state, it shall forward to the congress of the United States such consent, together with an

official copy of such constitution, with the request that the said new state may be admitted in the union of states."

CONSTITUTIONAL CONVENTION.

The election provided for in the ordinance of the 20th of August, 1861, was had and a majority of the people voted for the formation of the new State and elected delegates to a constitutional convention, which met in Wheeling in November, 1861. This convention adopted a constitution, and the following are sections five, seven and eight of article eight of that instrument:

"5. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."

"7. The Legislature may at any time direct a sale of the stocks owned by the State in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt; and hereafter the State shall not become a stockholder in any bank. If the State become a stockholder in any association or corporation for purposes of internal improvement, such stock shall be paid for at the time of subscribing, or a tax shall be levied for the ensuing year, sufficient to pay the subscription in full."

"8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

An ACT giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State.

Passed May 13, 1862.

1. Be it enacted by the General Assembly, That the consent of the Legislature of Virginia be, and the same is hereby given to the formation and erection of the State of West Virginia, within the jurisdiction of this State, to include the counties of Hancock, Brooke, Ohio, Marshall, Wetzel, Marion, Monongalia, Preston, Taylor, Tyler, Pleasants, Ritchie, Doddridge, Harrison, Wood,

Jackson, Wirt, Roane, Calhoun, Gilmer, Barbour, Tucker, Lewis, Braxton, Upshur, Randolph, Mason, Putnam, Kanawha, Clay, Nicholas, Cabell, Wayne, Boone, Logan, Wyoming, Mercer, McDowell, Webster, Pocahontas, Fayette, Raleigh, Greenbrier, Monroe, Pendleton, Hardy, Hampshire and Morgan, according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia and the schedule thereto annexed, proposed by the convention which assembled at Wheeling, on the twenty-sixth day of November, eighteen hundred and sixty-one.

2. Be it further enacted, That the consent of the legislature of Virginia be, and the same is hereby given, that the counties of Berkeley, Jefferson and Frederick, shall be included in and form part of the State of West Virginia whenever the voters of said counties shall ratify and assent to the said constitution, at an election held for the purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe.

3. Be it further enacted, That this act shall be transmitted by the executive to the senators and representatives of this commonwealth in congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of congress to the admission of the State of West Virginia into the union.

4. This act shall be in force from and after its passage.

An Act for the Admission of the State of West Virginia into the Union, and for other purposes.

Whereas the people inhabiting that portion of Virginia known as West Virginia did, by a convention assembled in the city of Wheeling on the twenty-sixth of November, eighteen hundred and sixty-one, frame for themselves a constitution with a view of becoming a separate and independent State; and whereas at a general election held in the counties composing the territory aforesaid on the third day of May last, the said constitution was approved and adopted by the qualified voters of the proposed State; and whereas the Legislature of Virginia, by an act passed on the thirteenth day of May, eighteen hundred and sixty-two, did give its consent to the formation of a new state within the jurisdiction of the said State of Virginia, to be known by the name of West Virginia, and to embrace the following named counties, to-wit: Hancock, Brooke, Ohio, Marshall, Wetzel, Marion, Monongalia, Preston, Taylor,

Tyler, Pleasants, Ritchie, Doddridge, Harrison, Wood, Jackson, Wirt, Roane, Calhoun, Gilmer, Barbour, Tucker, Lewis, Braxton, Upshur, Randolph, Mason, Putnam, Kanawha, Clay, Nicholas, Cabell, Wayne, Boone, Logan, Wyoming, Mercer, McDowell, Webster, Pocahontas, Fayette, Raleigh, Greenbrier, Monroe, Pendleton, Hardy, Hampshire, and Morgan; and whereas both the convention and the Legislature aforesaid have requested that the new State should be admitted into the Union, and the constitution aforesaid being republican in form, Congress doth hereby consent that the said forty-eight counties may be formed into a separate and independent State. Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of West Virginia be, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever, and until the next general census shall be entitled to three members in the House of Representatives of the United States: *Provided, always,* That this act shall not take effect until after the proclamation of the President of the United States hereinafter provided for.

It being represented to Congress that since the convention of the twenty-sixth of November, eighteen hundred and sixty-one, that framed and proposed the constitution for the said State of West Virginia, the people thereof have expressed a wish to change the seventh section of the eleventh article of said constitution by striking out the same and inserting the following in its place, namely: "The children of slaves born within the limits of this State after the fourth day of July, eighteen hundred and sixty-three, shall be free; and that all slaves within the said State who shall, at the time aforesaid, be under the age of ten years, shall be free when they arrive at the age of twenty-one years; and all slaves over ten and under twenty-one years shall be free when they arrive at the age of twenty-five years; and no slave shall be permitted to come into the State for permanent residence therein:" Therefore

Sec. 2. *Be it further enacted,* That whenever the people of West Virginia shall, through their said convention, and by a vote to be taken at an election to be held within the limits of the said State, at such time as the convention may provide, make, and ratify the change aforesaid, and properly certify the same under the hand of the president of the convention, it shall be lawful for the President of the United States to issue his proclamation, stating the

fact, and thereupon this act shall take effect and be in force from and after sixty days from the date of said proclamation.

APPROVED, December 31, 1862.

AN ACT transferring to the proposed State of West Virginia, when the same shall become one of the United States, all this State's interest in property, unpaid and uncollected taxes, fines, forfeitures, penalties and judgments, in counties embraced within the boundaries of the proposed State aforesaid.

Passed February 3, 1863.

1. Be it enacted by the General Assembly of Virginia, That all property, real, personal and mixed, owned by or appertaining to this state, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to and become the property of the state of West Virginia, and without any other assignment, conveyance, transfer or delivery than is herein contained; and shall include among other things not herein specified, all lands, buildings, roads and other internal improvements, or parts thereof situated within the said boundaries, and now vested in this state, or the president and directors of the board of the literary fund, or the board of public works thereof, or in any person or persons, for the use of the state to the extent of the interest and estate of this state therein; and shall also include the interest of this state, or of the said president and directors, or of the said board of public works, in any parent bank or branch doing business within the said boundaries; and all stocks of any other company or corporation, the principal office or place of business whereof is located within the said boundaries standing in the name of this state or the said president or directors, or of the said board of public works, or of any person or persons, for the use of this state.

2. Be it further enacted, That all unpaid and uncollected arrearages of taxes on lands, town lots, property tax, capitation tax, license tax, militia fines, fines imposed by courts, forfeitures and penalties, belonging to the state in the hands of sheriffs, collectors or individuals, in any or all of the counties embraced within the boundaries of the proposed state of West Virginia, as also all bonuses on the capital stock of any bank, taxes on the dividends declared by any bank, savings institution or insurance company; dividends on stock owned by the state, or by the board of public

works, or the president and directors of the board of the literary fund, in any bank, bridge or other corporation in any one of the counties aforesaid; also taxes on seals, deeds, wills, writs and other legal processes due from the clerks of the courts, notaries public or the secretary of the commonwealth; taxes on passengers and tonnage due from railroad companies, taxes on bank notes or other property transported by express companies within the counties aforesaid; also all fines, forfeitures and penalties incurred by railroads, express companies or other parties or persons within the counties aforesaid; also all judgments, decrees or penalties incurred by officers of the state, railroad or express companies, or other persons before or since the reorganization of the state government at the city of Wheeling; also all suits and their results now pending in the name of the board of public works, or of the president and directors of the board of the literary fund in any court of any of the counties aforesaid; also all taxes on lands, town lots, property tax, capitation tax, license tax, assessed in the counties aforesaid, and due the state for the year eighteen hundred and sixty-three, in the hands of officers of the state or individuals, together with all the rights of the state, or of the board of public works, or of the president and directors of the board of the literary fund to any and all moneys and claims in the counties aforesaid that may not be specifically mentioned in this act, but that rightfully belong to the state or corporations for the use of the state, shall be the property of the State of West Virginia, when the same shall become one of the United States.

3. It shall be the duty of all sheriffs or collectors of the public revenue, also of the presidents or other officers of railroad, express, bridge or internal improvement companies, presidents and other officers of banks, savings banks and insurance companies, clerks of courts, notaries public, the secretary of the commonwealth, and of individuals owing or having money in their hands due the state, or the board of public works, or the president and directors of the board of the literary fund, in any of the counties aforesaid, to pay the same into the treasury of the state of West Virginia, when the same shall become one of the United States.

4. Be it further enacted, For the purpose of carrying this act into effect, that suits may be brought in the name of the commonwealth for the use of the state of West Virginia, when it becomes

one of the United States on any bond or claim which shall pass to or become the property of the state of West Virginia by virtue of this act.

5. Be it further enacted, That if the appropriations and transfers of property, stocks and credits provided for by this act take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this state: provided that no such property, stocks and credits shall have been obtained since the reorganization of the state government.

6. It shall be the duty of the auditor of public accounts, the secretary of state, the treasurer and the adjutant general of this commonwealth to procure fit and proper blank books for the purpose, and cause to be transcribed therein true copies of all such records, official acts, orders, minutes and memoranda, and like copies of original papers upon which any such official action was based, which from its locality or general state interest appertains to and will be useful and advantageous to the state of West Virginia; and the officers aforesaid shall severally certify to the governor of this commonwealth the correctness of their respective copies; and it shall be the duty of the governor to certify to all whom it may concern, the official character of such officers so certifying under the great seal of this commonwealth, and deliver all such copies to the governor of West Virginia, when his election is officially declared, for the use of said state of West Virginia.

7. This act shall take effect when the proposed state of West Virginia shall become one of the United States.

An ACT making an appropriation to the proposed new State of West Virginia when the same shall become one of the United States.

Passed February 4, 1863.

1. Be it enacted by the General Assembly of Virginia, That the sum of one hundred and fifty thousand dollars, be, and is hereby appropriated to the state of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the states of the United States.

2. Be it further enacted, That there shall be, and hereby is ap-

propriated to the said state of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said state of West Virginia shall become one of the United States; provided, however, that when the said state of West Virginia shall become one of the United States, it shall be the duty of the auditor of this state, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said state of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this state.

3. Be it further enacted, That the act passed May fourteenth, eighteen hundred and sixty-two, making an appropriation of one hundred thousand dollars to the State of West Virginia, be, and the same is hereby repealed.

4. This act shall be in force from passage.

Legislature of 1867.

On the 25th day of January, 1867, Governor Arthur I. Boreman sent to the legislature a communication, dated on January 20, 1867, from Governor F. H. Pierpoint, of Virginia, together with a certain joint resolution adopted by the General Assembly of Virginia on the 28th day of February, 1866, in reference to the re-union of the States of Virginia and West Virginia and the adjustment of the public debt, and appointing Mr. A. H. H. Stuart, Mr. William Martin and Mr. John Janny as commissioners to proceed to the seat of government of West Virginia, and giving them authority to treat with the authorities of West Virginia on both subjects. On the 28th day of February, 1867, the legislature of West Virginia adopted the following joint resolution, to-wit:

Senate Joint Resolution No. 19, "To provide Commissioners to treat with the authorities of Virginia in regard to the public debt of that State:"

Whereas, the General Assembly of Virginia, on the twenty-eighth day of February, 1866, adopted a series of resolutions deeply lamenting the dismemberment of the "Old State," and declaring a

sincere desire to establish and perpetuate the reunion of the States of Virginia and West Virginia, and appealing to their brethren of West Virginia, to concur with them in the adoption of suitable measures of co-operation in restoration of the ancient Commonwealth of Virginia, with all her people and up to her former boundaries, and further providing for the appointment of three Commissioners with authority to treat on the subject of the restoration of the State of Virginia to its ancient jurisdiction and boundaries, and further empowering said Commissioners to treat with the authorities of the State of West Virginia upon the subject of a proper adjustment of the public debt of the State of Virginia, due or incurred previous to the dismemberment of the State;

And whereas, Commissioners have been appointed on the part of the State of Virginia pursuant to, and for the purpose named in the resolutions aforesaid;

And whereas, the citizens of West Virginia deeply regret the civil strife, (for which they are in no way responsible) in the midst of which they secured their State organization, yet they regard their separate State existence of the most vital importance to them, and have no purpose or intention whatever, of reuniting with the State of Virginia;

And whereas, the citizens of this State are not only willing but deeply anxious that a prompt and equitable settlement should be made between the State of Virginia and West Virginia, and they greatly regret that the State of Virginia has interposed a difficulty by the institution of a suit against this State, to recover jurisdiction over the counties of Berkeley and Jefferson, which they fear will delay such settlement; Therefore,

Resolved by the Legislature of West Virginia:

1. That the people of this State are unalterably opposed to a reunion of this State with the State of Virginia, and will not entertain any proposition looking to that end.

2. That so soon as the suit of Virginia against this State, now pending in the Supreme Court of the United States, to recover jurisdiction over the counties of Berkeley and Jefferson has been finally disposed of, the Governor of this State appoint three Commissioners on the part of this State to treat with the Commissioners appointed by the State of Virginia upon the adjustment of the public debt of said State as provided in Section IX of "An ordinance to provide for the formation of a new State," adopted by a

convention of the people of Virginia on the 20th day of August, 1861, and in Section VIII. of Article VIII of the Constitution of West Virginia, and report their action to the Governor, to be by him communicated to the Legislature of this State for their approval or disapproval.

Legislature of 1870.

Governor William E. Stevenson in his message on the 18th of January, 1870, called attention to the resolution of February, 28th, 1867.

On the 24th day of February, 1870, Gov. William E. Stevenson transmitted to the Legislature of West Virginia, then in session at Wheeling, a communication from Gilbert C. Walker, then Governor of the Commonwealth of Virginia, enclosing an act entitled "An Act for the adjustment of the public debt with the State of West Virginia," which had been passed by the General Assembly of Virginia on the 18th day of February, 1870.

On the 28th day of February, 1870, the Governor of West Virginia transmitted to the Legislature of West Virginia a communication from Messrs. William J. Robertson, W. T. Sutherlin and P. H. Aylett, commissioners appointed on the part of Virginia with reference to the settlement of the public debt of Virginia.

On the 1st day of March, 1870, the Legislature adopted the following joint resolution:

Joint Resolution raising a Joint Committee to confer with the Commissioners appointed by the State of Virginia, to adjust the Public Debt with the State of West Virginia.

WHEREAS, The State of Virginia, by act approved February the eighteenth, eighteen hundred and seventy, provided for the appointment of three commissioners to treat with the authorities of the state of West Virginia upon the subject of a proper adjustment of the public debt of the state of Virginia; and

WHEREAS, The governor by a communication dated February twenty-fourth, eighteen hundred and seventy, notified the legislature of the passage of the above recited act; and

WHEREAS, The governor on the twenty-eighth of February, eighteen hundred and seventy, notified the legislature that said commissioners, on the part of Virginia, had been appointed, and are now in the city of Wheeling for the purpose of carrying said act, above recited, into effect, therefore,

Resolved by the Legislature of West Virginia, That a joint committee of two upon the part of the Senate and three upon the part of the House of Delegates, be appointed by the presiding officers of their respective bodies, to confer with said commissioners, and report to this legislature the result of said conference.

2. All communications connected with said commission are hereby referred to said committee.

On the part of the Senate, Henry G. Davis and William I. Boreman were appointed.

On the part of the House, John J. Davis, Henry Brannon and Francis H. Pierpoint were appointed.

Joint Resolution adding two members to the joint special committee to confer with the Virginia commissioners.

Resolved by the Legislature of West Virginia, That Daniel Lamb, on the part of the house, and one member on the part of the senate, be added to the joint special committee, to confer with the commissioners of Virginia, in relation to the Virginia state debt.

ADOPTED March 1, 1870.

The additional member on the part of the senate was J. D. Ramsdell.

So far as the journals of the House and Senate of the session of 1870 show, no report was made by this committee.

On the 3rd of March, 1870, the following resolution was adopted:

Joint Resolution relating to the adjustment of the public debt with the commissioners appointed for the purpose by the State of Virginia.

Resolved by the Legislature of West Virginia, That the governor appoint three resident citizens of this state, one from each congressional district, to treat with the authorities of the state of Virginia on the subject of a proper adjustment of the public debt of that state, due or incurred prior to the first day of January, eighteen hundred and sixty-one, and a fair division of the property belonging to that state on that day; and make report thereof to this legislature for its approval or disapproval at its next regular session, with the facts and documents upon which their report is founded. Provided, that nothing herein contained shall be construed as waiving or impairing in any way the rights of this state to jurisdiction over the counties of Berkeley and Jefferson.

2. The commissioners so to be appointed shall proceed without

delay in the execution of their duties, and as compensation for their services, shall receive six dollars per day for the time actually employed therein, and the same mileage as that allowed to members of the legislature.

Legislature of 1871.

Gov. William E. Stevenson in his message to the Legislature of 1871 discussed at length the Virginia debt proposition and explained the reasons why no report was made under the above resolution and submitted the matter again to this Legislature.

On the 15th day of February, 1871, the Legislature adopted the following joint resolution:

Joint Resolution authorizing the appointment of commissioners to treat with the state of Virginia on the subject of the state debt. Resolved by the Legislature of West Virginia:

1. That the governor, on or after the fifteenth day of March, 1871, appoint three disinterested citizens of this state to treat with the authorities of the state of Virginia on the subject of a proposed adjustment of the public debt of that state prior to the first day of January, 1861, and make report thereof to the governor, to be printed and communicated by him to the legislature, at the commencement of its next session, for approval or disapproval.

2. The commissioners so to be appointed are further directed to ascertain and report the amount of said debt then held by persons other than the state of Virginia, and what said debt was incurred for, and what amount of this state debt was then held by the commissioners of the sinking fund and by the board of the library fund; that they ascertain and report the amount of all investments then held by the state, their respective amounts and character, and what portions thereof were then productive, and the dividends therefrom, and whether any of such investments then so held by said state have since been donated, changed, converted or disposed of by the authorities of said state, and if so, the amount and how disposed of; that they ascertain and report the revenue derived for the fiscal year ending on the thirtieth of September, 1860, from all sources, by the state of Virginia, within the present territory of Virginia, and the amount derived from all sources from the territory now composing the state of West Virginia; and that they report any other relevant matter deemed proper by them.

3. The commissioners so to be appointed shall proceed without

delay in the execution of their duties, and as a compensation for their services shall each receive six dollars per day for the time they or any one or more of them may be actually employed therein, and the same mileage as that allowed to the members of the legislature, and may employ such accountant or clerk, at a reasonable compensation, as they may deem necessary: and the governor shall have the power to remove any one or more of the commissioners, and fill any vacancy that may occur from removal, death or failure to act.

4. Nothing herein contained shall be construed as waiving or impairing in any way the rights of this state to jurisdiction over the counties of Berkeley and Jefferson.

5. That the foregoing resolutions be communicated by the governor to the governor of Virginia.

ADOPTED, February 15, 1871.

On the 15th day of February, 1871, the Legislature adopted the following joint resolution:

STATE OF WEST VIRGINIA,
EXECUTIVE DEPARTMENT

Charleston, February 17, 1871.

Gentlemen of the Senate:

I have the honor herewith to transmit a certified copy of a Joint Resolution, adopted by the General Assembly of Virginia, and approved February 11, 1871, tendering to West Virginia an arbitration for the apportionment of the public debt, which I this day received from His Excellency the Governor of Virginia. The resolution is accompanied by a letter from His Excellency, addressed to the Governor and Legislature of West Virginia, which I also respectfully communicate.

W. E. STEVENSON,
Governor.

COMMONWEALTH OF VIRGINIA,
EXECUTIVE CHAMBERS,

Richmond, February 10, 1871.

To His Excellency, the Governor, and General Assembly of West Virginia:

In pursuance of the authority vested in the Governor by a Joint Resolution passed by our General Assembly, and approved on the fourteenth day of February instant, entitled "Joint Resolution

tendering to West Virginia an arbitration for the apportionment of the public debt," an authenticated copy of which is hereto attached, I, Gilbert C. Walker, Governor of the Commonwealth of Virginia, on behalf of said Commonwealth, do hereby tender to the State of West Virginia "an arbitration of all matters touching a full and fair apportionment between said States, of the said public debt, contracted by the State of Virginia prior to January 1, 1861," upon the conditions in said Joint Resolution specified, viz: Each State to select two arbitrators, not residents thereof, and the four thus selected to appoint an umpire, if they shall deem it advisable, and the arbitrators and umpire thus chosen, to proceed, as soon as practicable, to adjust, award and decide upon fair, just and equitable principles what proportion of said public debt should be paid by West Virginia, and what part thereof should be paid by the State of Virginia: each State being represented by counsel if desired. The sole duty of the arbitrators and umpire will be to ascertain the amount of the public debt which each State ought justly to assume and pay.

It is earnestly hoped that the State of West Virginia will promptly accept this fair and equitable mode of adjustment of the public debt, to the end that the question involved may be speedily, satisfactorily and finally settled.

I have the honor to be, very respectfully, your obedient servant,

G. C. WALKER,

Governor of the Commonwealth of Virginia.

JOINT RESOLUTION.

Tendering to West Virginia an arbitration for the apportionment of the public debt.

(Approved February 11th, 1871.)

WHEREAS, The constitution of both Virginia and West Virginia impose upon the respective legislatures of said States the duty to provide by law, for the adjusting between them the proportion of the public debt, contracted prior to the first of January, 1861, proper to be borne by each of said States; and

WHEREAS, It is essential to the financial interests of Virginia

that said settlement should be obtained as soon as practicable, therefore

Be it Resolved by the General Assembly of Virginia:

That the Governor of this Commonwealth be, and he is hereby, authorized to tender to the State of West Virginia an arbitration of all matters touching a full and fair apportionment between said States of the public debt, and in the event of the acceptance of such offer of arbitration by West Virginia, then the Governor, Lieutenant Governor, President of the Court of Appeals, Auditor of Public Accounts and the Secretary of the Commonwealth shall appoint two arbitrators on the part of this State, who shall not be citizens of this State, to meet any two arbitrators selected by West Virginia, not citizens of said State.

The arbitrators so appointed shall, if they deem it advisable, appoint an umpire. Said arbitrators and umpire shall, as soon as practicable, proceed to adjust, award and decide upon fair, just and equitable principles what proportion of said public debt shall be paid by West Virginia, and what part thereof shall be paid by this State. Said apportionment, when ascertained and made, to be reported by said arbitrators to the Legislatures of said States, to enable them to carry out such award or apportionment by appropriate legislation.

Each State may be represented by counsel, and the board hereby directed to appoint the arbitrators for Virginia shall be, and are hereby, authorized to draw on the Treasury of the State of Virginia, out of any money not otherwise appropriated, a sum sufficient to defray the necessary expenses of this arbitration on the part of Virginia.

A copy.

(Signed) J. BELL BIGGER,

Clerk of House of Delegates and Keeper of the Rolls of Virginia,
February 11, 1871.

On the same day the Legislature adopted the following joint resolution:

"Senate Joint Resolution No. 19, 'Raising a Joint Special Committee to consider the communication from the Governor of Virginia, concerning the proposed arbitration of the debt between Virginia and West Virginia.' "

“Resolved by the Legislature of West Virginia:

“That a Joint Special Committee of three on the part of the House of Delegates, and two on the part of the Senate, be appointed to consider and report on the communication from the Governor of Virginia, concerning the proposed arbitration of the public debt between Virginia and West Virginia.”

On the part of the Senate, Mr. Henry G. Davis and Mr. George Koonce were appointed as members of such committee, and on the part of the House, Mr. James M. Jackson, Mr. James H. Ferguson and Mr. George C. Sturgiss were appointed as members of such committee.

On the 20th day of February, 1871, this special committee made the following report:

“To the Legislature of West Virginia:

“The Joint Special Committee, to whom was referred the special message of the Governor of the State, enclosing a Joint Resolution of the General Assembly of Virginia and the communication of the Governor of said State, tendering to West Virginia an arbitration for the apportionment of the public debt of Virginia contracted prior to the first of January, 1861, have had the same under consideration and submit the following

REPORT:

“The Legislature, by Joint Resolution No. 21, passed February fifteenth instant, having conferred upon the Governor authority, and instructed him to appoint three disinterested citizens of this State to treat with the authorities of the State of Virginia, on the subject of a proper adjustment of the public debt of that State, prior to the first day of January, 1861, and the authorities of the State of West Virginia having ever evinced a sincere desire to adjust and settle at the earliest practicable moment, the proportion of said debt proper to be borne by each of said States, and the Committee believing that the citizens of the respective States would of necessity be more familiar with the circumstances attending the creation of said debt and the many intricate questions connected therewith, and upon the proper comprehension of which must depend the equitable adjustment and apportionment of the same between said States, recommend that said tender of arbitration by arbitrators and umpire not citizens of either State, be respectfully

declined; and that the said State of Virginia be invited to appoint three disinterested citizens of that Commonwealth as Commissioners, with authority to treat with like Commissioners to be appointed under said Joint Resolution No. 21, on behalf of this State, with power to adjust, award and decide upon fair, just and equitable principles, what proportion of said debt should be paid by each of said States, subject to the ratification and approval of the General Assembly of Virginia and the Legislature of West Virginia; and to carry out the objects herein stated; the Committee recommend the adoption of the following:

“Senate Joint Resolution No. 21. ‘Providing for the settlement of the debt between Virginia and West Virginia.’ ”

“WHEREAS, The Legislature of West Virginia in discharge of the duty imposed by the Constitution of the State, to ‘ascertain as soon as may be practicable’ the equitable proportion of the public debt of the Commonwealth of Virginia to be assumed and liquidated by this State, has authorized and directed by Joint Resolution passed on the fifteenth day of February, 1871, the appointment by the Governor of ‘three disinterested citizens of this State to treat with the authorities of the State of Virginia on the subject of a proper adjustment of the public debt of that State, prior the first day of January, 1861;’ ” and

“WHEREAS, The Governor of the Commonwealth of Virginia, by authority conferred by a Joint Resolution of the General Assembly of said Commonwealth, passed February 11th, 1871, has tendered on behalf of said Commonwealth to the State of West Virginia, ‘an arbitration of all matters touching a full and fair apportionment between said States, of the said public debt’ by arbitrators, not citizens of either of said States, and not subject to the ratification of the legislative departments of said States; and

“WHEREAS, Any adjustment of the said debt should be subject to such ratification; and

“WHEREAS, Citizen commissioners would of necessity be more familiar with the circumstances attending the creation of said debt, and the many intricate questions connected therewith, and upon the proper comprehension of which must depend the equitable apportionment and adjustment of the same between said States; therefore,

“Resolved by the Legislature of West Virginia:

“1. That the tender of an arbitration made by the Governor of the Commonwealth of Virginia to this State for the adjustment of the public debt of said Commonwealth, having been anticipated

by the action of the Legislature of this State, authorizing the appointment of Commissioners to treat upon said subject, the said tender is respectfully declined, and the Commonwealth of Virginia is invited to appoint three disinterested citizens as Commissioners with authority to treat with like Commissioners heretofore authorized on the part of this State. And said Commissioners on behalf of this State in addition to the powers heretofore conferred, are hereby further empowered to proceed, as soon as practicable, to adjust, award, and determine, upon fair, just and equitable principles, what proportion of said public debt of Virginia should, in their opinion, be paid by West Virginia, and what part thereof should be paid by Virginia, subject, however, to the approval and ratification of the Legislature of West Virginia and the General Assembly of Virginia.

"2. The governor of this State is hereby directed to communicate to the Governor of the Commonwealth of Virginia, without delay, certified copies of this preamble and Joint Resolution.

Respectfully submitted,

JAMES M. JACKSON,
JAMES H. FERGUSON,
GEORGE C. STURGISS,
H. G. DAVIS,
GEORGE KOONCE,
Committee."

"February 20, 1871."

This report was signed by all the members of the Committee and the resolution therein set out was on the 24th day of February, 1871, adopted by the Legislature.

Under the resolutions of February 15th and 24th Governor J. J. Jacob appointed Mr. John J. Jackson, Mr. J. M. Bennett and Mr. A. W. Campbell.

REPORT
OF THE
Virginia Debt Commissioners of 1871.

REPORT

OF THE

VIRGINIA DEBT COMMISSIONERS OF 1871.

To His Excellency,

J. J. JACOB,

Governor of West Virginia:

SIR: Under the joint resolutions passed by the West Virginia Legislature on the 15th and 24th days of February, last, the undersigned were appointed Commissioners by you "to treat with the authorities of Virginia on the subject of a proposed adjustment of the public debt of that State prior to the first day of January, 1861," and were directed by the legislature "to make report thereof to the Governor," which we have the honor to do as follows:

On the 9th day of August last the Commissioners met in Parkersburg to confer together upon the subject matter of their appointment and to organize a programme of procedure in respect thereof. They addressed a letter to your Excellency notifying you of their meeting and organization, and also the following letter to Governor Walker, of Virginia:

PARKERSBURG, W. VA., }
AUGUST 9, 1871. }

To His Excellency, the Governor of Virginia:

SIR: The undersigned have the honor to inform you that under the joint resolutions passed by the legislature of West Virginia on the 15th and 24th days of February last, they have been appointed Commissioners by the Governor of West Virginia to treat with Virginia in regard to the debt as it stood on the first day of January, 1861."

Also, that they met in this city to-day for the purpose of entering upon the discharge of their duties, and to this end have designated General John J. Jackson as their chairman, through whom they propose to receive such communications as your Excellency may be pleased to submit.

Will your Excellency be pleased to indicate at your earliest convenience what action, if any, has been or is likely to be taken by Virginia in the matter of appointing Commissioners, or, in the event of no such appointments, what channel of communication will be open to us.

We have the honor to be

Your Excellency's most ob't servants,

JOHN J. JACKSON,

J. M. BENNETT,

A. W. CAMPBELL.

After forwarding this letter, together with the one to your Excellency, the Commissioners adjourned to meet in Richmond on a day to be agreed upon later in the season, there to confer with the authorities of Virginia, and to make such examination of public documents as might enable them to carry out the objects of their appointment.

Meanwhile they received from the Governor of Virginia in answer to their letter of August 9th, a letter dated September 7th, the same purporting to be a copy of a letter addressed to your Excellency, and which is as follows:

EXECUTIVE CHAMBERS,)
RICHMOND, Sept. 7, 1871.)

His Excellency,

J. J. JACOB,

Governor of West Virginia:

SIR: I have the honor to acknowledge the receipt of your communication of the 17th ulto., notifying me of the appointment of Messrs. Bennett, Jackson and Campbell as Commissioners on behalf of the State of West Virginia to treat with the authorities of this State upon the subject of the State debt. I have also received a certified copy of the joint resolutions empowering you to make these appointments. Absence from the capital has prevented an earlier response to these several communications.

On the 18th of February, 1870, an act was passed by the Legislature of this State, and approved by me, authorizing the Governor to appoint three Commissioners on behalf of this State to treat with the authorities of West Virginia upon the subject of a proper adjustment of the public debt of the State of Virginia, due or incurred previous to the dismemberment of the State, and a fair division of the public property.

Commissioners were promptly appointed under this act, and notice of their appointment, together with an authenticated copy of the act, were at once forwarded to the Governor of West Vir-

ginia. No response whatever to my communication was made by the Governor of West Virginia, but I learned through other sources that the matter was promptly submitted to the Legislature then in session, by which, either by act or resolution, the Governor was authorized to appoint Commissioners to meet and confer with those appointed from Virginia. I have never been informed, however, of the appointment of any Commissioners under the authority thus conferred.

A history of these proceedings, together with a statement of my own views upon the subject, was submitted to our Legislature in my annual message of December last, a copy of which I herewith enclose. The Legislature, acting upon the suggestion of the message, on the 11th day of February last, by a joint resolution, authorized the Governor to tender to the State of West Virginia "an arbitration of all matters touching a full and fair apportionment between said States of the said public debt," an authenticated copy of which joint resolution, together with the tender of an arbitration as therein authorized, was promptly forwarded to the Governor of West Virginia.

This joint resolution, while it does not in terms repeal the act of February 18th, 1870, was intended to *supercede* it, and therefore I do not feel authorized to appoint Commissioners. Our tender of an arbitration has not been withdrawn, and I regret exceedingly that the authorities of West Virginia declined to accept it. I cannot understand what reasonable objection can be raised to this fair and equitable mode of adjustment so frequently resorted to by individuals and nations, and I trust that West Virginia will reconsider her action and accept the more speedy and satisfactory mode of settlement proposed by Virginia, to the end that prompt justice may be done to the creditors of the old State, and that harmony and good feeling may prevail between the people of the two States.

Very respectfully,

Your Excellency's ob't servant,

G. C. WALKER
Governor of Virginia.

(P. S.—Accompanying the above.) "The foregoing is a copy of the original letter mailed to Governor Jacob."

From this letter we at once understood that so far as a conference with Commissioners or other persons authorized to represent Virginia in that capacity was concerned, our mission was at an end. But the joint resolution under which we were acting, copies of which you had forwarded for our guidance, directed that we should "ascertain and report the amount of the debt of Virginia on the first day of January, 1861, and what said debt was incurred for, and what amount of this State debt was then held by the Com-

missioners of the Sinking Fund, and by the Board of the Library Fund." Also that we should "ascertain and report the amount of all investments then held by the State, their respective amounts and character, and what portion thereof were then productive, and the dividends therefrom, and whether any of such investments then held by said State have since been donated, changed, converted or disposed of by the authorities of said State, and, if so, the amount and how disposed of." Also that we should "ascertain and report the revenue derived from the fiscal year ending on the 30th of September, 1860, from all sources by the State of Virginia within the present territory of Virginia and the amount derived from all sources from the territory now comprising the State of West Virginia;" and also that we "report any other relevant matter deemed proper" by us.

In addition to the foregoing duties thus devolved upon us by the terms of the joint resolution passed on the 15th day of February, we "were further empowered," in the language of the additional joint resolution passed on the 24th of the same month, "to proceed as soon as practicable to adjust, award and determine upon fair, just and equitable principles what proportion of said public debt of Virginia should in their opinion be paid by West Virginia, and what part thereof should be paid by Virginia, subject, however, to the approval and ratification of the Legislature of West Virginia and the General Assembly of Virginia."

Under this authority and direction, thus minutely specified to us, we felt called upon to take substantially the same steps after the receipt of Governor Walker's letter of September 7th as we would have taken had we expected to meet Commissioners representing Virginia, viz: to go to Richmond and endeavor to gather the information expected and required under the terms of our appointment.

Accordingly we met in that city on the 9th of November last and after spending several days in the examination of such public documents as were available to us at the Capitol, and realizing the necessity for further and more explicit and official information than we could gather of ourselves unassisted from said documents, we addressed the following note to the Second Auditor of Virginia:

RICHMOND, November 14th, 1871.

To the Second Auditor of Virginia:

SIR: I am directed by the Commissioners representing West Virginia in the matter of the public debt of Virginia prior to the

first of January, 1861, to procure from your office such information as can be furnished upon the following points, viz:

1. The actual amount of the public debt of Virginia on the first of January, 1861. And under this head the amounts of said debt owned by the Sinking Fund, the amount owned by the Literary Fund, and the amount owned by the Library Fund.

2. What portion of the bonded debt was invested, and how invested on the first of January, 1861. Also what portion of the investment was productive, what were the dividends or profits arising therefrom for the year 1860, and whether any such investments have since been donated, changed, converted or otherwise disposed of.

3. What portion of the appropriations expended in West Virginia for public improvements came from the sales of State bonds and what portion from the revenues or taxes of Virginia.

4. A copy of the advertisement for the redemption of a portion of the public debt on the first of January, 1861.

5. A statement of the amount of public debt actually redeemed on the first of January, 1861, pursuant to said advertisement.

Upon these points the Commissioners desire to hear from you at your earliest convenience.

Very respectfully, your obedient servant,

A. W. CAMPBELL,

Secretary.

In reply to the foregoing communication we received the following note at 5 o'clock on the evening of the 16th of November, after a lapse of two and a half days, and after we had abandoned all hope of the assistance asked for in our letter, and after, in fact, we were on the eve of our departure for home:

SECOND AUDITOR'S OFFICE. }
RICHMOND, NOV. 16, 1871. }

A. W. Cambell, Esq., Secretary, &c.:

DEAR SIR:—Yours of the 14th was received. You ask me for a report upon a variety of questions connected with our public debt, the transactions of the Board of Public Works in regard to it, and the financial affairs of the State, which it is understood, of course, you propose to use in the contemplated adjustment of the portion to be paid by West Virginia of the debt.

To answer the questions propounded would involve an amount of labor which we could not bestow on the subject.

But, apart from this, I presume at an early day this office will be called upon by the Executive or the General Assembly of Virginia for detailed reports of all the matters referred to, which will be available to you.

The books and records of this office are open to your inspection.

I trust that in failing to respond to your inquiries you will not regard me as in any wise wanting in official courtesy to you or your associates. None, certainly, is intended.

I have the honor to be,

Most respectfully yours,

ASA ROGERS.

With the reception of this note the Commissioners closed their labors in Richmond, finding that a further stay was not likely to add to the scant information already gleaned by them from the public documents.

It is proper to say in connection with the Second Auditor's communication that we, in delivering our own communication to him, caused it to be verbally understood that we were ready and willing to pay for the services of an expert, competent to obtain for us the information requested, and that we did not desire or intend to trench upon the services of any one with whose duties the labor required might seriously conflict.

After this termination of their visit to Richmond, the Commissioners agreed to meet again on the 12th of December following, at Parkersburg, there to prepare and transmit to your Excellency such information as they had been able to obtain, and such as they might still further obtain, and along with it such an expression of opinion as is called for in the joint resolution of February 24th.

Accordingly we met in Parkersburg at the date named, and after nearly two weeks of examination and comparison of all the sources of information accessible to us, agreed upon and drew up the facts and statements hereinafter presented.

Previous to this meeting we had just received copies of the Richmond papers of December 7th, containing Governor Walker's message to the General Assembly of Virginia at its meeting on the 6th, in which we observed that among other allusions to the debt question pending between the two States, and after a reference to our correspondence with him of August last and his answer there-

to, as already quoted, he proceeds to arraign the good faith of the authorities of this State as follows:

"Now, if the authorities of West Virginia entertained an earnest desire to make a speedy and final settlement of this matter, why did they not accept our tender of arbitration? A mode of settlement of such controversies universally recognized by both nations and individuals as right and appropriate. Suppose an equal number of Commissioners appointed by each State, and that they should meet and disagree upon any or all points involved, who is to decide between them? And yet, beyond a doubt, they would radically disagree upon the first or chief point to be settled, viz: the basis or principle upon which the settlement should be made. But suppose that the Commissioners should finally agree, does any one suppose that their finding would be ratified by the legislatures of the two States, disagreeing as the people do radically upon the merits of the question at issue? Of course not."

This quotation from Governor Walker's message fairly exhibits the spirit in which he has seemed to view not only our own efforts to carry out the objects of our appointment but likewise the sincerity and good faith of the Legislature of West Virginia in providing for the appointment of such a commission by your Excellency. And yet while this is the case it is not to be forgotten that Virginia herself initiated this method of attempting to adjust the debt question. And the language of the Governor would seem to be all the more gratuitous in such a connection from the fact that in his annual message of December 7th, 1870, he considered it worth while to allude to the political change that had taken place in this State at the preceding October election, and bespoke in so many words for the "new administration" an "opportunity of manifesting its intentions and its appreciation of honesty and fair dealing." And yet notwithstanding this language by himself thus voluntarily employed on our behalf, and notwithstanding also the fact that one of the early acts of the "new administration" was to respond to the policy that Virginia herself had initiated, and before it was known in this State that she had changed that policy, and while the appointees under the response were in Richmond seeking in vain from the proper authority of Virginia for such information as every debtor is entitled in law to receive from his creditor, saying nothing of that spirit of "fair dealing" that was so conspicuously spoken on our behalf, Governor Walker proceeds in his late message to asperse the good faith of the State of West Virginia after the manner and in the words that we have quoted.

The authorities of West Virginia have never assumed to themselves any right of precedence in the matter of a policy for adjusting the difficulties surrounding the debt question. But in the joint resolution passed on the 24th of February last they did assume the modest right of adhering to the policy already inaugurated

by the State of Virginia, and by her so freely tendered heretofore for their acceptance, and therefore they respectfully declined to adopt a new and different proposition from her until they could test the merits of the one already adopted.

Apparently the present Executive of Virginia, from an enforced familiarity with the workings of "personal government," which he so much deplotes, has acquired ideas as to the right of the initiative between equal contracting parties that are scarcely consistent with the delicacy of the issue pending between this State and his own. For instance, in his letter of September the 7th, he tells us that the legislature of Virginia, upon his suggestion, has tendered an arbitration to this State, and he trusts "that West Virginia will reconsider her action and accept the more speedy and satisfactory mode of settlement proposed by Virginia." And again, in his late message, he says that "the better course to be pursued is for the two States to submit the whole question to arbitration," and West Virginia is arraigned, as heretofore shown, for not concurring in his opinions. Apparently it did not occur to the Governor that since Virginia had proposed both modes of settlement to this State, the latter might make her choice between them without subjecting her motives to imputation. And yet all that she had assumed to do is simply to chose between two policies initiated by Virginia. Unless, therefore, it can be shown that it is the prerogative of that State to prescribe the terms upon which the debt shall be adjusted the question should hereafter be discussed in a spirit better calculated to allay all sectional irritation.

■

But we pass from this incidental reference to Governor Walker's strictures upon the attitude of this State towards the debt question to the action of the Virginia legislature upon the same question as embodied in the act approved on the 30th of March last, and known as the Funding bill. This act is in keeping with the initiatory legislation in regard to the debt to which we have just referred. It assumes to apportion the debt of that State arbitrarily, notwithstanding her authorities had six weeks before the passage of the act received notice of the joint resolution of the West Virginia Legislature providing for the appointment of Commissioners. It assumes, also, to apportion the debt, not as it stood on the first day of January, 1861, but as it would stand on the first day of July, 1871, after the interest had been twice compounded, once in 1866, and again at the date last named; and to apportion it, too, upon the basis of territory and population, and without any reference to the equities that should always govern an assignment of debt between sections that were so notorious in our own case. In other words it assumes to apportion to West Virginia one-third of the debt as it now stands, simply on the ground that she has one-third of the territory and population formerly belonging to Virginia,

and without reference at all to the question of resources and values. This is apparently the practical result which Governor Walker hoped to reach when he urged upon us the "more speedy and satisfactory mode of settlement proposed by Virginia," inasmuch as he tells us in his late message that this is the "plan for a reorganization of the State debt," which he "had recommended twelve months before."

But without reference to the authorship of this or any other "plan" for adjusting the debt question, we propose to consider as briefly as possible the real cause now pending between Virginia and West Virginia as we understand it.

The tables or statements which we annex as part of our report show, among other things, the following facts:

That the funded debt of Virginia on the first day of January, 1861, was \$31,778,867.32, after all reductions.

That all, or nearly all, of this debt was incurred for and actually expended in works of public improvements, such as canals, railroads, turnpikes, plank roads and bridges.

That this vast sum, upwards of \$30,000,000 was expended for improvements in the present State of Virginia, and only about two and a half millions in the present State of West Virginia.

That the present State of Virginia contains 41,352 square miles and West Virginia only 20,000 square miles, or less than one-third.

That the counties composing what is now Virginia contained by the census of 1860 a population of 1,220,829, and those composing West Virginia only a population of 374,985, or less than one-fourth.

To these exhibits we append others, under our instructions from the legislature, but they are such as do not enter into our argument here, which is to show that no just apportionment of the debt can be made upon the basis of population and territory alone, which is the basis upon which the Virginia Funding bill is confessedly predicated.

This theory of apportionment is apparently quite current among the people of that State, and is defended with ability by Judge Meredith, of Richmond, in a carefully prepared paper on the subject. His position is that West Virginia should pay one-third of the debt because, as he says, it is a principle of international law governing the division of nations that "the obligations which had accrued to the whole before the division are, unless they are the subject of special agreement, ratably binding upon the different

parts." This he gives as a quotation from Phillimore. Two inquiries present themselves in connection with it. First, was Virginia a nation in the sense intended by Phillimore? and, second, what are we to understand by a ratable part of a debt? We presume that it will not be contended that the general rights and obligations of a nation, as defined by international law, belonged to Virginia prior to the division of the State, and therefore we cannot admit the applicability of the quotation in that particular. Neither can we admit Judge Meredith's construction of the word ratable. He applies it exclusively to territory and population and excludes everything in the shape of resources and value, such as public works, buildings and institutions, which, as we all know, vitally affect the equity of a division of territory.

Judge Meredith next adduces the following quotation from Chancellor Kent to sustain his position:

"If a State should be divided in respect to territory, its rights and obligations are not impaired, and if they have not been apportioned by special agreement those rights are to be enjoyed and those obligations fulfilled by all the parts in common."

This quotation is much more intelligible and just, and we think will tend to sustain the conclusions we have reached, as hereinafter stated.

In addition to the two quotations already given, Judge Meredith cites other authorities to sustain his position that West Virginia is chargeable with one-third of the debt, but we do not regard them as applicable to the case under consideration. First, because Virginia is not a nation. Second, because in all the cases referred to in the authorities quoted, treaty stipulations had more or less to do with the question. Third, because the debts were war debts, the benefits of which, if any, accrued to each individual, and the obligations of which therefore rested upon each. In no instance was the debt created for internal improvements which necessarily confer partial and local benefits that in most cases exceed the general benefit to the State at large. We, therefore, fail to see the proper analogy that should exist to make these citations precedents for the case of Virginia and West Virginia.

Judge Meredith winds up these references to various authorities, by two general deductions of his own, as follows:

1. "That the public debt of a State is not affected by a change in the form of its government, nor by the partition of its territory into two States, but remains in full force and must be discharged."

2. "That if a State be divided into two or more States, the debts

which had been contracted by the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts in proportion to territory and population."

The first deduction it is not necessary to consider, as West Virginia, in her ordinance of separation from Virginia, as also in her constitution, agreed to pay an equitable proportion of the public debt. What that equitable proportion is we are now considering.

In reference to the second deduction we have to remark that Judge Meredith draws a conclusion from his authorities which they do not sustain. Phillimore, for instance, says that "if a nation be divided into various distinct societies, the obligations which had accrued to the whole before the division are ratably binding upon the different parts." Here Phillimore and the authorities stop. But this does not suffice for the Virginia side of the question, and Judge Meredith adds after the word "parts" the words "in proportion to territory and population." These words are not found in any of the authorities, so far as we are advised, and certainly not in any of the quotations adduced by the Judge.

A moment's consideration will show that a division of debt according to population and territory would not only be impracticable but would conflict with common sense. It would be impracticable because it does not determine the relative value of each one of the two elements of population and territory. Suppose the population to be twice as much as the territory, or suppose the territory to be three times as great as the population, which element has the greater value in determining the result?

Without pursuing this thought further it is manifest that nothing is settled by such a rule. You must fix the relative value of the two elements before you can reach a conclusion. It is, therefore, plain why the books do not give the rule as stated by Judge Meredith. Because of its indefiniteness, but mainly because of its injustice. Would any sane man lay down a rule for the division of a State which would ignore the great cities, public improvements, public works, institutions of all kinds, great commercial advantages, such as rivers and harbors and the great advantage of fertility of soil; all of which, and many other elements of wealth, property and power, might be found in one division and be wholly absent in the other. Hence we say that such a rule is repugnant to common sense.

A public debt is mainly a charge upon the wealth and resources of a people. It is represented by taxes, and taxes are imposed not on numbers or square miles but on resources and values. How much stronger is the case when the very debt under consideration

was created in developing and enriching one portion of the State almost exclusively. Nay, more, when that division of the State is in possession of and enjoying, giving away and selling at auction and otherwise disposing of the very subjects for which the debt was created.

These considerations afford abundant reason why no authority would say, in the absence of a compact (unless there was perfect homogeneity) that it would be just to divide a "nation" any more than an individual estate by population and territory. We doubt not that Judge Meredith himself would scout the idea of dividing an estate on such a basis and without reference to the quality of the land and the improvements made. Why then would he ignore such considerations in apportioning a public debt between two divisions of a State? Chancellor Kent, whom he has quoted, does not sustain him in so doing. The quotation already given from that author says that "if a State should be divided in respect to territory its rights and obligations are not impaired; and if they have not been apportioned by agreement, those rights are to be enjoyed and those obligations fulfilled by all the parts in common." Not a word in this quotation about a division ratably according to population and territory. According to this authority the State of Virginia was only a tenant in common with West Virginia in all the public works, improvements and property of the original undivided State, and had no authority to alienate, sell, give away, or dispose of any of the public works, and being in possession and holding them for her own exclusive use and benefit, by ousting West Virginia, she would be bound to account to the latter for her share. This would seem to be the legitimate conclusion from the authorities relied on by Judge Meredith, even admitting their applicability to the case under consideration, which we do not concede by any means; and, therefore, with this reference we pass them by.

We think we take a more practicable view of the subject, and one which will attain all the ends of justice. The table accompanying this report shows that the bonded debt of Virginia on the first day of January, 1861, represented money borrowed and expended in improving the State by canals, railroads, turnpikes, plank roads and bridges. All these expenditures conferred a local and special benefit, were expended, not only by the outlay of the money in creating a market and stimulating enterprise and trade, but in otherwise developing the resources of particular localities to an extent quite equal to the general benefit of the State at large. And this local and general development is the sum of the value of the improvements to the section where located, and gives them an inestimable and abiding value to that section. This value is progressive and not susceptible of being fixed. So certainly is this the case that it is probable, if it were practicable to utterly ex-

tinguish these improvements, and thereby extinguish the debt, that the State where they are located would not listen to such a proposition.

It may be assumed then that the public works for which the debt was created are worth what they cost. Virginia, by selling, donating, and disposing of these works as her own property, without regard to the rule laid down by Chancellor Kent, and without consulting West Virginia, must be taken to have accepted them on that basis, and is therefore chargeable with them on that basis.

When the tables are consulted they will show an expenditure of over thirty millions in Virginia and about two and a half millions in West Virginia. Much of this latter was expended at comparatively recent dates, whereas the expenditures in Virginia range through a period of fifty years, with benefits accruing more or less throughout that period. In the light of such facts, we submit that no intelligent mind, wishing only to do justice, can doubt for a moment that the benefits conferred, and not the territory and population, should be the principal, if not the only basis of an adjustment of the debt. The Governor of Virginia, in his message of 1870, and again in 1871, and the Legislature of that State, by its funding bill, seem, however, to have entirely overlooked the foregoing considerations, and to have jumped to the conclusion that West Virginia should pay one-third of the debt.

We see the case differently. On the one hand, for instance, we see rich cities, commercial marts of all kinds, navigable rivers, fine harbors, a highly improved and productive territory, wealthy capitalists and a well to do people, public institutions, such as a State Capitol and extensive public grounds, an Executive Mansion, a Penitentiary, Armory, University, two Lunatic Asylums, a Military Institute, a Blind Asylum, a valuable miscellaneous and law library, a large literary fund and the United States deposit of surplus revenue. All these resources in addition to the vast millions invested in canals and railroads and other avenues of inland commerce.

On the other hand we see set in the balance against these rich resources the territory of West Virginia, less than one-third of the old State, much of it broken into barren mountains and hills, no navigable streams penetrating it in every direction, no railroad but the Baltimore & Ohio, no public works or institutions, her lands mostly covered with unbroken forests and rewarding industry but grudgingly, no outlets in the interior for the little surplus existing, the people poor and subsisting by rough work in the woods and fields, possessed of no capital wherewith either to develop their localities or ameliorate their own condition in life in fact, their only wealth being for the most part their poor soil, their untiring perseverance and their indomitable love of liberty.

And yet, notwithstanding this great discrepancy between the condition and resources of the two States, Virginia assigns one-third of her funded and compounded debt to West Virginia to pay, simply because the latter has one-third of the territory and one-fourth the population formerly belonging to the whole State. And this, too, notwithstanding her papers have often proclaimed that West Virginia was a foster child of the old State, and as such dependent upon her bounty. This opinion we shall not stop to discuss, and we only refer to it as showing the inconsistency between the theory and practice of our Virginia friends. Supposing it to be correct, the explanation as to how it came about can never be made creditable to those who lavished all their favors on one section of the State, and withheld them from the other, and the vindication of the step taken by West Virginia during the war in separating from the old State consists largely of this traditional discrimination against her. And in this connection it may not be out of place to notice that the increase of population in West Virginia during the decade from 1860 to 1870 was of a character to still further vindicate the step taken, it being about thirty per cent. This large increase illustrates her onward march since her separation from her former foster parent, and tends to suggest how far in advance of her present position she really might have been had she received in the past anything more than "the crumbs that fell from the rich man's table."

We come now to the conclusion of our report. Having given our reasons why we dissent entirely from the position of Virginia in reference to the debt, we proceed to state our own conclusions in regard to it as follows:

Statement A, as annexed to our report, shows that the bonded debt of Virginia, on the first of January, 1861, after all deductions, was \$31,779,067.32.

The same statement also shows that all of said debt was expended within the present State of Virginia, with the exception of \$2,784,329.29.

Statement E, shows that \$328,706.22 was collected from counties in West Virginia after January 1st, 1861.

Statement F, shows that the amount of expenditures for all purposes in West Virginia was \$3,343,929.29.

We are not able to say certainly what part of this expenditure was from the proceeds of State bonds, (and, therefore, a part of the State debt) and what part was appropriated from the regular receipts of the treasury. We have had access to no data that could determine the question. Our letter to the Second Auditor at

Richmond sought information on this point in vain. But we have given Virginia the benefit of it all as a credit on her side of the account, although the resolutions under which we are acting contemplate nothing on the part of West Virginia but an assumption of her proportion of the bonded debt, inasmuch as both sections and particularly Virginia, received appropriations out of the ordinary receipts of the treasury.

We have charged West Virginia with all that we have found expended within her limits, viz: The amount of the funded debt created for improvements within her territory, the amount invested in her banks, the amount expended on the Lunatic Asylum at Weston, and the estimated value of the property known as the Lewisburg Law Library.

On the other hand we have credited her with her share of the estimated value of the public property and assets of Virginia, other than the property represented in the bonded indebtedness. This latter equalizes itself, and therefore does not enter into the account. Virginia has the property and owes the debt which it represents. We refer only to the public buildings, institutions, and other assets as given in statement G. As to West Virginia's share in these we can only venture an approximate estimate. The public buildings, the common property of the two States, paid for out of the general revenue, we have estimated at \$3,875,000, as per statement G, and it would be reasonable we think to estimate West Virginia's interest in them at one-fourth on the basis of population.

The same statement shows that the surplus revenue of the United States deposited with the State under the act of Congress, June 23, 1836, gave Virginia \$2,937,237.34, of which sum she appears to have received at least \$1,932,809.33. This act assigned to each State its share of deposits on the basis of its representation in Congress, and Virginia having, in 1860, thirteen representatives, three of whom were from West Virginia, it would seem that three-thirteenths of that fund belonged to the latter.

To this share of the deposits, and her interest in the public property, we add, as per statement, her proportion of the Literary Fund. This fund at the date quoted in statement G, amounted to \$1,509,583.16: As it was apportioned throughout the State on the basis of the white population, we follow that rule in assigning to West Virginia three-sevenths of it, that being her ratio of white population in 1860.

Upon the data thus ascertained and explained, we summarize the account between the two States as follows:

* WEST VIRGINIA TO THE STATE OF VIRGINIA.

| | |
|---|----------------|
| <i>Dr.</i> For the amounts expended and invested in her territory as set forth in statement F | \$3,343,929.29 |
| <i>Cr.</i> By one-fourth of the estimated value | |

| | | |
|--|--------------|---------------|
| of the public buildings and other assets, as given in statement G.... | \$968,750.00 | |
| “ By three-thirteenths of the United States surplus fund as per same statement | 446,032.92 | |
| “ By three-sevenths of the Literary fund as per same | 647,079.92 | |
| “ By the amount collected in West Virginia after January 1, 1861, as per statement E | 328,706.22 | 2,390,569.06 |
| Balance due Virginia | | \$ 953,360.23 |

This is the balance as we find it after a protracted examination of such sources of information as were available to us. And the ascertainment of it naturally brings our labors to a conclusion. We commend our investigations to Your Excellency's favorable consideration. From the beginning we realized that the results arrived at must necessarily be only proximate in their character, inasmuch as our sources of information were limited. Subsequent inquiry, under more favorable circumstances, may change the general result a few thousands for or against either State, but such a contingency is of course unimportant. The principle upon which the debt should be adjusted is the important point to settle. And it is to this point, as set forth in these pages, that we beg leave, through Your Excellency, to call the attention of the Legislature.

Very respectfully,

Your Excellency's most obedient servants,

J. J. JACKSON,
J. M. BENNETT,
A. W. CAMPBELL.

STATEMENT A.

Showing the Amount of the Public Debt of Virginia on the First Day of January, 1861, and the Amounts Thereof Held by that State. Also the Amount Thereof Incurred for Public Improvements in West Virginia.

| | | |
|--|-----------------|-----------------|
| The debt of Virginia on the first day of January, 1861, as per the Auditor's report to the extra session of the Legislature on the 10th of December preceding, was as follows: | | |
| Debt of January 1, 1852 | \$10,508,815 30 | |
| Debt created since that time | 23,379,946 33 | |
| Total | | \$33,888,761 63 |
| Less the amount redeemed on 31st December, 1860 | | |
| Less amount in the Sinking Fund | \$ 257,731 31 | |
| Less amount in the Literary Fund | 1,402,963 00 | |
| Less amount in the Library Fund | 248,000 00 | |
| Less Bonds lost on Steamship Arctic | 16,000 00 | |
| Less amount of the debt January 1, 1861 | 145,000 00 | \$ 2,100,724 31 |
| This debt as will be seen by Statement F, was mainly incurred for works of public improvement. | | |
| Statement F shows that \$2,784,329.29 of it was incurred for improvements in West Virginia. | | \$31,779,067 32 |
| Said improvements are as follows: | | |
| Joint Stock Turnpike | \$ 906,196 32 | |
| Roads on State Account | 1,145,619 07 | |
| Bridge Companies | 76,612 30 | |
| Navigation Companies | 26,840 00 | |
| Railroads | 540,100 00 | |
| Lunatic Asylum at Weston | 125,000 00 | |
| Deduct Virginia's pro rata for improvements lying in both States | | \$ 2,901,297 89 |
| | | 176,938 00 |
| | | \$ 2,784,329 29 |

*The statement shows as total expenditure in West Virginia of \$3,343,629.29, but only the above amount for public improvement.

STATEMENT B.

Showing the amount and character of the investments held by the State of Virginia on the first of January, 1861, together with those that have since been donated or otherwise changed, as per Governor Walker's message to the Virginia Legislature of March 8, 1870.

| | | |
|---|-----------------|-----------------|
| Alexandria, Loudon and Hampshire Railroad..... | \$ 50,862 00 | |
| Blue Ridge Railroad..... | 1,744,723 00 | |
| Chesapeake & Ohio Railroad..... | 2,484,134 00 | |
| Norfolk and Petersburg Railroad..... | 1,341,341 00 | |
| Orange and Alexandria Railroad..... | 1,151,297 00 | |
| Richmond and Danville Railroad..... | 1,847,585 00 | |
| Richmond and Petersburg Railroad..... | 385,600 00 | |
| Richmond and York River Railroad..... | 490,999 00 | |
| South Side Railroad..... | 1,883,500 00 | |
| Virginia and Kentucky Railroad..... | 103,348 00 | |
| Virginia and Tennessee Railroad..... | 3,755,100 00 | |
| Marietta and Cincinnati Railroad..... | 202,611 00 | |
| James River and Kanawha Canal..... | 10,400,000 00 | |
| Other Navigation Companies..... | 1,192,616 00 | |
| Plank Roads, Turnpikes and Bridges..... | 4,761,554 00 | |
| Chesapeake and Ohio Canal..... | 900,000 00 | |
| Selden, Withers & Co..... | 436,000 00 | |
| Total..... | | \$33,131,090 00 |
| To this amount add, as per Governor Walker's message of March 8, 1870, for amounts "lost, abandoned, or surrendered and released," the following sums, viz: | | |
| Subscription paid to Covington & Ohio Railroad Co..... | \$ 3,206,461 83 | |
| Subscription paid to Fredericksburg & Gordonsville Railroad Company..... | 163,299 00 | |
| Subscription paid to City Point Railroad Company..... | 110,000 00 | |
| Subscription paid to Blue Ridge Railroad Company..... | 1,100,000 00 | |
| Subscription paid to Manassas Gap Railroad Company..... | 2,280,000 90 | |
| Subscription paid to Portsmouth & Roanoke Railroad Company..... | 406,050 00 | |
| Subscription paid to Roanoke Valley Railroad Company..... | 397,402 00 | |
| Subscription paid to Winchester & Potomac Railroad Company..... | 270,000 00 | |
| Subscription paid to Alexandria, Hampshire and Loudon Railroad Company..... | 1,017,248 00 | |
| Subscription paid to Navigation and other companies..... | 298,032 05 | |
| Loss by Selden, Withers & Co., and Chesapeake & Ohio Canal Company..... | 580,000 00 | |
| *Total..... | | 9,739,092 88 |
| Grand Total..... | | \$42,870,182 88 |

*We add these amounts simply because we find them given by the Governor as addenda to the \$33,131,090.00, and not because we find them in any official record to which we have had access.

STATEMENT C.

Showing the amount of revenue contributed by the counties composing the State of West Virginia to the Treasury of Virginia for the fiscal year ending September 30, 1860, together with the amount in the aggregate contributed by the present State of Virginia.

| COUNTIES. | | COUNTIES. | |
|---------------|--------------|---------------|---------------|
| Barbour .. | \$ 11,402 86 | Monongalia .. | \$ 22,116 00 |
| Berkeley .. | 31,819 72 | Morgan .. | 6,111 98 |
| Boone .. | 4,481 95 | Nicholas .. | 6,156 59 |
| Braxton .. | 6,968 90 | Ohio .. | 48,710 29 |
| Brooke .. | 9,112 34 | Pleasants .. | 3,981 46 |
| Cabell .. | 14,353 52 | Preston .. | 15,081 36 |
| Calhoun .. | 2,105 50 | Pocahontas .. | 8,380 89 |
| Clay .. | 1,820 82 | Putnam .. | 8,465 10 |
| Doddridge .. | 5,765 72 | Pendleton .. | 8,588 99 |
| Fayette .. | 6,642 01 | Randolph .. | 8,537 30 |
| Gilmer .. | 4,875 78 | Ritchie .. | 8,778 51 |
| Greenbrier .. | 30,863 02 | Raleigh .. | 3,979 31 |
| Hancock .. | 6,068 57 | Ronne .. | 4,960 46 |
| Harrison .. | 27,117 22 | Taylor .. | 10,530 33 |
| Hampshire .. | 26,850 45 | Tyler .. | 7,213 93 |
| Hardy .. | 19,986 40 | Tucker .. | 2,237 74 |
| Jackson .. | 11,357 91 | Upshur .. | 9,661 71 |
| Jefferson .. | 47,263 59 | Wayne .. | 8,156 39 |
| Kanawha .. | 26,929 46 | Webster .. | 534 35 |
| Lewis .. | 12,004 97 | Wetzel .. | 6,450 94 |
| Logan .. | 4,444 96 | Wirt .. | 3,913 52 |
| Marion .. | 19,985 80 | Wood .. | 22,114 67 |
| Marshall .. | 15,657 33 | Wyoming .. | 2,304 99 |
| Mason .. | 20,257 22 | | |
| Mercer .. | 5,926 80 | Total .. | \$ 626,351 97 |
| Monroe .. | 25,343 32 | | |

| | |
|--|-----------------|
| Add for taxes on bank dividends .. | \$ 10,214 99 |
| Bank dividends themselves .. | 10,513 60 |
| | \$ 647,079 96 |
| Total revenue of Virginia for the fiscal year ending September 30, 1860 .. | \$ 4,182,510 27 |
| Less the amount borrowed that year .. | 245,636 71 |
| Revenue proper .. | \$ 3,936,873 56 |
| Deducting amount paid by West Virginia .. | 647,079 96 |
| Leaves the amount paid by Virginia as .. | \$ 3,289,793 60 |
| By this Virginia would pay of the public debt .. | \$26,547,582 22 |
| West Virginia would pay of the same .. | 5,231,485 10 |

*The taxation on dividends of branches of Virginia banks in West Virginia is not included, because not ascertained.

STATEMENT D.

Showing the population of West Virginia, by counties in 1860, also the area in square miles as given by Boye's map of the counties existing at date of its publication. Also, the years in which said counties were formed.

NOTE.—There is a discrepancy of several thousand square miles between Boye's map and Mitchell's. The former gives the area of Virginia at 65,624 and the latter at 61,352*.

| COUNTIES. | Population. | Square Miles. | Formation of County. | COUNTIES. | Population. | Square Miles. | Formation of County. |
|-----------------|-------------|---------------|----------------------|-----------------|-------------|---------------|----------------------|
| Barbour..... | 8,959 | 308 | 1772 | Monroe..... | 10,759 | 614 | 1790 |
| Berkeley..... | 12,525 | 282 | 1796 | Morgan..... | 2,731 | 271 | 1820 |
| Boone..... | 4,840 | 1,033 | 1869 | Nicholas..... | 4,636 | 1,431 | 1813 |
| Braxton..... | 4,982 | ..... | ..... | Ohio..... | 22,432 | 375 | 1776 |
| Brooke..... | 5,494 | ..... | ..... | Pendleton..... | 6,165 | 999 | 1718 |
| Cabell..... | 8,070 | ..... | ..... | Pleasants..... | 2,945 | ..... | ..... |
| Calhoun..... | 2,502 | ..... | ..... | Pocahontas..... | 3,958 | 794 | 1821 |
| Doddridge..... | 5,263 | ..... | ..... | Preston..... | 13,312 | 601 | 1818 |
| Fayette..... | 5,997 | ..... | ..... | Putnam..... | 6,301 | ..... | ..... |
| Gilmer..... | 3,759 | ..... | ..... | Raleigh..... | 3,367 | ..... | ..... |
| Greenbrier..... | 12,210 | 1,469 | 1778 | Randolph..... | 4,990 | 2,061 | 1787 |
| Hampshire..... | 13,913 | 989 | 1754 | Ritchie..... | 6,847 | ..... | ..... |
| Hancock..... | 4,445 | ..... | ..... | Roane..... | 5,382 | ..... | ..... |
| Hardy..... | 9,864 | 1,156 | 1786 | Taylor..... | 7,463 | ..... | ..... |
| Harrison..... | 13,790 | 1,095 | 1784 | Tucker..... | 1,428 | ..... | ..... |
| Jackson..... | 8,306 | ..... | ..... | Tyler..... | 6,517 | 855 | 1814 |
| Jefferson..... | 14,575 | 225 | 1801 | Upshur..... | 7,792 | ..... | ..... |
| Kanawha..... | 16,150 | 2,090 | 1789 | Wayne..... | 6,747 | ..... | ..... |
| Lewis..... | 8,029 | 1,754 | 1816 | Webster..... | 1,553 | ..... | ..... |
| Logan..... | 4,938 | 2,930 | 1824 | Wetzel..... | 6,703 | ..... | ..... |
| Marion..... | 12,721 | ..... | ..... | Wirt..... | 3,751 | ..... | ..... |
| Marshall..... | 13,001 | ..... | ..... | Wood..... | 11,046 | 1,223 | 1799 |
| Mason..... | 9,185 | 904 | 1804 | Wyoming..... | 2,861 | ..... | ..... |
| McDowell..... | 1,335 | ..... | ..... | Totals..... | 274,987 | 24,040 | ..... |
| Mercer..... | 6,818 | ..... | ..... |  |  |  |  |
| Monongalia..... | 13,048 | 721 | 1776 | | | | |

NOTE.—On a debt of \$31,779,967.32 divided equally between a population of 1,594,291, (which was the whole population of Virginia in 1860 would be nearly \$19.03 3.7-100 mills each, and would impose a debt on the above population of \$74,087, amounting to \$7,474,642.46.

*No complete survey of the State has ever been made, and in consequence of the irregular exterior lines no reliable estimate of the State's area appears to have been attained. By Herman Boye's map, made in 1825, the area is as above. By L. Von Bucholtz's map by authority of Virginia in 1860, the mean length of the State is given at 360 miles, and the mean breadth at 200 miles, giving a horizontal area of 61,352 miles, which is the same as given in Mitchell's map.

STATEMENT D.—Continued.

A Table Showing the Appropriate Number of Square Miles in Virginia and West Virginia.

By Boye's map, the number of square miles in Virginia prior to the division was 65,624, or 41,999,360 acres.

By the Auditor's report for 1861, the number of Square miles in the State was reported at 81,549, or 52,191,360 acres.

There appears to be not only a wide discrepancy in these respective authorities, but likewise an error in reducing the square miles to acres. These errors are no doubt to be accounted for by the notorious fact, that under the Virginia system of patenting lands the same lands are on the Commissioner's books several times.

By Mitchell's General Atlas for 1868, the area of Virginia is given at 41,352 square miles, and that of West Virginia at 20,000, which would give to West Virginia something less than one-third of the joint territory.

There being no map that gives the area of the counties of West Virginia separately, we have assumed that the statement given by Mitchell is approximately correct.

STATEMENT E.

Showing the Revenue paid into the Treasury of Virginia since the first day of January, 1861, from counties now included within West Virginia.

Amounts marked with a † were collected by judgments or executions in the year named, but for what particular year is uncertain.

Where it was plain that any collections were arrears for 1860, they have not been brought into this statement. †

| COUNTIES. | 1861 | 1862 | 1863 | 1864 | 1865 | Total. |
|-----------------|-----------|------------|------------|------------|----------|---------------|
| Barbour..... | \$ 726 14 | \$..... | \$..... | \$..... | \$..... | \$ 726 14 |
| Braxton..... | 797 50 | ..... | ..... | † 1,000 00 | ..... | 1,797 50 |
| Boone..... | 381 02 | † 2 00 | ..... | ..... | ..... | 383 02 |
| Cabell..... | 739 08 | ..... | ..... | † 2,307 82 | ..... | 739 08 |
| Calhoun..... | ..... | ..... | ..... | ..... | ..... | 2,307 82 |
| Fayette..... | 391 35 | ..... | ..... | † 84 57 | ..... | 391 35 |
| Gilmer..... | ..... | ..... | ..... | ..... | ..... | 84 57 |
| Greenbrier..... | 26,945 81 | 44,084 83 | 79,227 26 | ..... | ..... | 150,257 90 |
| Hardy..... | 16,508 10 | ..... | ..... | ..... | ..... | 16,508 10 |
| Jackson..... | 800 00 | ..... | ..... | ..... | ..... | 800 00 |
| Jefferson..... | 32,269 06 | ..... | ..... | ..... | ..... | 32,269 06 |
| Kanawha..... | 1,590 76 | † 1,694 33 | † 2,738 00 | † 3,467 00 | ..... | 9,490 09 |
| Lewis..... | 946 10 | ..... | ..... | ..... | ..... | 946 10 |
| Logan..... | 472 52 | ..... | † 25 63 | † 1,410 08 | ..... | 1,908 23 |
| Marshall..... | 107 95 | ..... | ..... | ..... | ..... | 107 95 |
| Mason..... | 675 66 | ..... | ..... | ..... | ..... | 675 66 |
| Mercer..... | ..... | ..... | † 1,111 91 | ..... | ..... | 1,111 91 |
| McDowell..... | ..... | ..... | 1,200 00 | ..... | ..... | 1,200 00 |
| Monroe..... | 22,415 34 | 33,470 48 | ..... | ..... | ..... | 55,885 82 |
| Morgan..... | 615 00 | ..... | ..... | ..... | ..... | 615 00 |
| Nicholas..... | ..... | ..... | 5,000 00 | ..... | ..... | 5,000 00 |
| Pleasants..... | 365 00 | ..... | ..... | ..... | ..... | 365 00 |
| Pendleton..... | 8,006 61 | 6,000 00 | 16,900 00 | ..... | ..... | 30,906 61 |
| Pocahontas..... | 7,714 00 | ..... | ..... | ..... | ..... | 7,714 00 |
| Putnam..... | 746 10 | ..... | ..... | ..... | ..... | 746 10 |
| Raleigh..... | ..... | ..... | † 600 00 | ..... | ..... | 600 00 |
| Ritchie..... | 21 12 | ..... | ..... | ..... | ..... | 21 12 |
| Roane..... | ..... | ..... | † 3,487 81 | ..... | ..... | 3,487 81 |
| Upshur..... | 660 75 | ..... | ..... | ..... | ..... | 660 75 |
| Wayne..... | 354 74 | ..... | ..... | ..... | ..... | 354 74 |
| Webster..... | 20 00 | ..... | ..... | ..... | ..... | 20 00 |
| Wyoming..... | ..... | ..... | ..... | ..... | † 624 97 | 624 97 |
| | | | | | | \$ 328,706 22 |

†On the exclusion from this statement of taxes levied in 1860 and collected in 1861, the Commissioners were not unanimous. For it was maintained that the taxes of 1860 were levied and collected chiefly to pay interest falling due January 1 and July 1, 1861. One-fourth of the taxes especially designed to pay the July interest was not payable into the treasury until about the 15th of February, 1861. The taxes were collected off of the people who had assumed the burden of the debt and ought to be applied to their relief.

STATEMENT F.—WEST VIRGINIA'S INDEBTEDNESS TO THE STATE OF VIRGINIA.

Showing (approximately) the amount of the public debt of Virginia that was incurred for works of improvement in the territory now included within the State of West Virginia, and such other sums as West Virginia is chargeable with.

These improvements consist of works in which Virginia was a joint stockholder with private companies, and of works constructed wholly on her own account, and certain miscellaneous expenditures.

Date of the several acts authorizing these expenditures is given as far as ascertained.

These expenditures are classified as follows: (1.) Joint Stock Companies. (2.) Roads Constructed on State account. (3.) Bridge Companies. (4.) Navigation Turnpike. (5.) Railroads. (6.) Miscellaneous.

| Date of Act. | Class 1.—Joint Stock Turnpikes. | Amount of the Appropriations. | Amount Expended. | Amount Unexpended. | Miles Length. |
|----------------|---------------------------------------|-------------------------------|------------------|--------------------|---------------|
| 1849, March 15 | Back Creek Valley Turnpike | 1,500 00 | 1,140 00 | 360 00 | ..... |
| 1849, March 15 | Berkeley and Hampshire Turnpikes. | 21,000 00 | 16,750 00 | 4,250 00 | ..... |
| 1849, March 15 | Buckhannon and Little Kanawha | 7,473 00 | 7,473 00 | ..... | 24 |
| 1848, Febr'y 9 | Brandonville, Kingwood and Evansville | 6,000 00 | 3,193 46 | 2,806 54 | ..... |
| 1848, Febr'y 9 | Clarkshurg and Buckhannon. | 32,000 00 | 28,314 49 | 3,685 51 | ..... |
| 1848, Febr'y 9 | Clarkshurg and Phillip. | 6,000 00 | 5,446 25 | 553 75 | 22 |
| 1848, Febr'y 9 | Cranberry Summit and Brandonville. | 4,815 00 | 4,120 11 | 694 89 | 18 1/4 |
| 1848, Febr'y 9 | Clarkshurg and Wheeling. | 10,200 00 | 4,195 35 | 6,004 65 | ..... |
| 1848, April 3 | Cacapon and North Branch. | 12,000 00 | 12,000 00 | ..... | 45 |
| 1848, Jan'y 22 | Charleston and Point Pleasant. | 31,200 00 | 31,200 00 | ..... | 56 |
| 1849, March 9 | Charleston, Ripley and Ravenswood. | 30,000 00 | 27,319 41 | 2,680 59 | ..... |
| 1849, March 9 | Bunkard Creek. | 6,000 00 | 6,000 00 | ..... | ..... |
| 1849, March 9 | Elk River | 37,000 00 | ..... | ..... | ..... |
| 1849, March 9 | Franklin and Circleville. | 2,400 00 | 116 00 | 36,884 00 | ..... |
| 1849, March 30 | Fish Creek Road | 6,000 00 | 2,175 00 | 3,825 00 | ..... |
| 1849, March 30 | Gnaty Creek and West Union. | 10,800 00 | 6,000 00 | 4,800 00 | 25 |
| | | | 5,000 35 | 3,000 45 | ..... |

STATEMENT F.—Continued.

| Date of Act. | Class 1—Joint Stock Turnpike. | Amount of the Appropriation. | Amount Expended. | Amount Unexpended. | Miles Length. |
|----------------|--|------------------------------|------------------|--------------------|---------------|
| 1830, March 21 | Grave Creek and Pennsylvania State Line,.... | 4,800 00 | 1,840 00 | \$ 3,000 00 | 4 3/4 |
| 1831, .. 25 | Gilmer and Braxton | 7,200 00 | 6,669 80 | 500 20 | 26 1/4 |
| 1831, .. 19 | Gilmer, Ripley and Ohio | 30,000 00 | 29,974 80 | 25 20 | 61 |
| 1831, .. 1 | Giles, Fayette and Kanawha | 45,000 00 | 44,990 00 | 8 40 | 70 |
| 1849, .. 15 | Hardy and Winchester | 23,400 00 | 23,400 00 | 0 00 | 18 |
| 1849, .. 15 | Hamshire and Morgan | 6,000 00 | 6,510 00 | 10,865 22 | 20 3/4 |
| 1849, .. 15 | Hardy and Randolph | 18,000 00 | 7,134 78 | 2,100 00 | 28 1/4 |
| 1848, March 25 | Harrisville | 8,100 00 | 6,000 00 | 0 00 | 6 |
| 1850, Feb'y 9 | Hudgesville and Potomac | 6,000 00 | 6,000 00 | 0 00 | 6 |
| 1849, March 9 | Hillsborough and Harper's Ferry | 15,000 00 | 10,650 00 | 4,350 00 | 26 1/4 |
| 1838, .. 2 | Holiday's Cove | 10,359 24 | 6,139 24 | 4,200 00 | 8 |
| 1832, .. 26 | Huntersville and Warm Springs | 2,400 00 | 2,400 00 | 0 00 | 5 3/4 |
| 1831, .. 30 | Holiday's Ferry and New Cumberland | 1,358 00 | 1,358 00 | 0 00 | 52 |
| 1837, .. 2 | Holiday's Ferry Road | 5,000 00 | 5,000 00 | 5,905 87 | 31 |
| 1846, Feb'y 2 | Kanawha and Logan | 40,000 00 | 34,950 00 | 18,050 00 | 15 1/4 |
| 1846, .. 25 | Kanawha and West Union | 21,000 00 | 2,950 00 | 0 00 | 0 |
| 1834, March 12 | Kear's Falls and New Columbia | 4,350 00 | 5,847 84 | 3,752 16 | 0 |
| 1849, March 11 | Lewisburg and Blue Sulphur | 27,000 00 | 7,320 24 | 20,278 76 | 9 3/4 |
| 1849, March 15 | Logan, Raleigh and Monroe | 12,000 00 | 11,948 75 | 56 25 | 12 1/2 |
| 1849, Jun'y 20 | Marsh-hall and Ohio | 18,000 00 | 15,200 00 | 2,710 00 | 22 1/4 |
| 1849, Jun'y 20 | Martinsburg and Potomac | 27,000 00 | 27,000 00 | 0 00 | 0 |
| 1849, Jun'y 20 | Martinsburg and Winchester | 27,000 00 | 27,000 00 | 0 00 | 0 |

STATEMENT F.—Continued.

| Date of Act. | CLASS 1—Joint Stock Turnpike. | Amount of the Ap- propriations. | Amount Expended. | Amount Unexpended. | Miles Length |
|----------------|------------------------------------|---------------------------------------|---------------------|-----------------------|-----------------|
| 1854, Feb'y 18 | Middleway and Germidstown..... | \$ 12,000 00 | \$ 11,943 75 | \$ 56 25 | 12 |
| 1848, March 24 | Millwood and Berryville..... | 9,000 00 | 9,000 00 | ..... | 6½ |
| 1849, March 13 | Moorefield and North Branch..... | 39,300 00 | 28,137 75 | 11,162 25 | ..... |
| 1849, March 13 | Moorefield and Alleghany..... | 10,200 00 | 8,779 78 | 1,420 22 | 27½ |
| 1849, March 13 | Morgantown and Bridgeport..... | 27,000 00 | 10,687 40 | 16,312 60 | 36 |
| 1851, Feb'y 25 | Morgantown and Beverly..... | 7,399 96 | 2,999 96 | 5,000 00 | ..... |
| 1851, Feb'y 25 | Morgantown and Frederick..... | 9,000 00 | 8,005 00 | 995 00 | 20 |
| 1851, March 28 | Newark..... | 3,600 00 | 3,000 00 | 600 00 | 10 |
| 1850, Feb'y 25 | New Creek and Hardy..... | 6,000 00 | 5,431 24 | 568 76 | 20½ |
| 1848, April 4 | New Manchester..... | 2,000 00 | 2,000 00 | ..... | 6 |
| 1850, March 11 | Patterson's Creek Valley..... | 5,300 00 | 9,000 00 | ..... | 35 |
| 1850, Feb'y 17 | North River..... | 3,400 00 | 3,400 00 | ..... | 21½ |
| 1850, March 11 | Parkersburg and Elizabethtown..... | 4,800 00 | 4,078 00 | 722 00 | 21½ |
| 1850, March 30 | Pleasant Valley and Tunnelton..... | 2,700 00 | 2,078 00 | 622 00 | 28½ |
| 1850, March 30 | Potomac..... | 9,000 00 | 2,489 70 | 1,921 55 | 40½ |
| 1850, Feb'y 18 | Ravenwood and Reedy Creek..... | 7,200 00 | 9,600 00 | 2,400 00 | 52½ |
| 1851, March 21 | Reedy and Harrisville..... | 7,200 00 | 1,751 87 | 5,448 13 | 41½ |
| 1850, Jan'y 13 | Red Bluff and Sulphur Springs..... | 8,856 00 | 8,856 00 | ..... | 32½ |
| 1851, March 12 | Richie and Calumet..... | 9,000 00 | 8,891 18 | 108 82 | 51 |
| 1854, Feb'y 28 | Richie and Boone..... | 1,800 00 | 1,800 00 | ..... | 39 |
| 1851, March 10 | Raleigh and Wythe Line..... | 4,800 00 | 2,800 00 | 2,000 00 | 39 |
| 1851, March 31 | Salem and Harrisville..... | 7,200 00 | 3,817 92 | 3,382 08 | 24 |
| 1851, March 31 | Sandy..... | 3,000 00 | 3,000 00 | ..... | 24 |

STATEMENT F.—Continued.

| Date of Act. | Class 1—Joint Stock Turnpikes. | Amount of the Ap- propriations. | | | Amount Expended. | Amount Unexpended. | Miles Length |
|----------------|--|------------------------------------|---|---------------|---------------------|-----------------------|--------------|
| | | \$ | % | \$ | | | |
| 1851, March 24 | St. Marys | 6,000 00 | | 6,000 00 | | | 24 |
| 1856, Jan'y 31 | Shepherdstown and Smithfield | 18,575 00 | | 18,575 00 | | | 13 3/4 |
| 1862, March 15 | West and Salt Sulphur Springs | 10,200 00 | | 10,104 00 | 96 00 | | 28 1/2 |
| 1867, Feb'y 7 | Sistersville and Salem | 20,000 00 | | 20,000 00 | | | 28 1/2 |
| 1869, " | Sistersville and Salem | 13,302 26 | | 13,302 26 | | | 33 3/8 |
| 1870, " | Shilston | 14,000 00 | | 14,000 00 | | | 14 |
| 1871, " | Smithfield, Charlestown and Harper's Ferry | 1,800 00 | | 1,305 35 | 494 65 | | |
| 1872, " | Walnut Gap Road | 98,000 00 | | 97,962 50 | 37 50 | | 40 3/4 |
| 1873, March 9 | Weston and Fairmont | 66,000 00 | | 64,098 31 | 1,901 69 | | 106 1/2 |
| 1874, " | Weston and Gauley Bridge | 13,800 00 | | 10,526 32 | 3,273 68 | | 29 1/4 |
| 1875, " | West Milford and New Salem | 21,000 00 | | 21,000 00 | | | 15 3/4 |
| 1876, " | Wheeling, West Liberty and Bethany | 7,071 01 | | 7,071 01 | | | 6 |
| 1877, " | Wheeling, West Liberty and Bethany | 16,200 00 | | 12,590 22 | 3,609 78 | | |
| 1878, " | Wellsburg and Washington | 8,400 00 | | 5,528 21 | 2,871 79 | | |
| 1879, " | Wellsburg and Washington | 3,200 00 | | 3,054 00 | 146 00 | | |
| 1880, " | Weston and West Union | 4,000 00 | | 3,130 65 | 869 35 | | 15 3/4 |
| 1881, March 15 | West Union | 4,000 00 | | 4,000 00 | | | 20 1/2 |
| 1882, Jan'y 8 | Williamsport | | | | | | |
| 1883, Jan'y 8 | White and Salt Sulphur | | | | | | |
| Total | | \$ 1,108,620 14 | % | \$ 906,106 32 | \$ 202,428 82 | | |

STATEMENT F.—Continued.

| Date of Act. | Roads Constructed Wholly on State Account. | Amount of the Ap- propriations. | Amount Expended. | Amount Unexpended. | Miles Length |
|----------------|--|---------------------------------------|---------------------|-----------------------|--------------|
| | Allegheny and Huntersville..... | \$ 11,600 00 | \$ 11,462 67 | \$ 137 33 | ..... |
| | Abbs' Valley and Tug Road..... | 5,000 00 | 4,450 00 | 550 00 | ..... |
| | Beverly and Fairmont..... | 77,000 00 | 75,284 65 | 1,615 35 | ..... |
| | Cove Spring and White House Road..... | 2,500 00 | 2,500 00 | ..... | ..... |
| | Clear Fork Road..... | 3,000 00 | ..... | 2,400 00 | ..... |
| | Franklin and Monterey..... | 14,000 00 | 14,000 00 | ..... | ..... |
| | Fairmont and Wheeling..... | 31,848 85 | 31,848 85 | ..... | ..... |
| | Huttonsville and Huntersville..... | 23,108 72 | 23,108 72 | ..... | ..... |
| | Huntersville and Lewisburg..... | 20,000 00 | 19,956 47 | ..... | ..... |
| | Marlin's Bottom and Lewisburg..... | 12,615 60 | 12,615 60 | 23 53 | ..... |
| | Middlefork..... | 15,000 00 | 14,467 34 | 532 66 | ..... |
| 1831, March 19 | North Western Turnpike..... | 452,579 87 | 452,579 87 | ..... | ..... |
| | Ohio River and Maryland Road..... | 95,934 37 | 95,934 37 | ..... | ..... |
| | Princeton and Red Sulpher Springs..... | 4,200 00 | 4,200 00 | ..... | ..... |
| | Staunton and Parkersburg..... | 308,277 51 | 355,884 30 | 12,413 21 | ..... |
| | Slavin Cabin and Summersville..... | 37,000 00 | 16,372 08 | 20,627 92 | 234 |
| | Wyoming Court House and Bluffs..... | 3,000 00 | 1,894 66 | 1,105 34 | ..... |
| | Road from South Branch to Petersburg..... | 900 00 | ..... | 900 00 | ..... |
| | Road from South Branch to Brock's Gap..... | 1,400 00 | 1,400 00 | ..... | ..... |
| | Berryville and Charlestown..... | 6,000 00 | 6,000 00 | ..... | ..... |
| | | \$ 1,185,024 41 | \$ 1,115,619 07 | \$ 39,405 34 | |

STATEMENT F.—Continued.

| Date of Act. | CLASS 3—Bridge Companies. | | | |
|-----------------------------|---------------------------------------|---------------------|-----------------------|--|
| | Amount of the Ap- propriations. | Amount Expended. | Amount Unexpended. | |
| Cheat River | \$ 6,000 00 | \$ 4,612 50 | \$ 1,387 50 | |
| Coal River | 3,000 00 | 3,000 00 | — | |
| Fairmont and Palatine | 12,000 00 | 12,000 00 | — | |
| Guyandotte | 12,000 00 | 12,000 00 | — | |
| Morgantown | 24,800 00 | 24,800 00 | — | |
| South Branch | 4,200 00 | 4,200 00 | — | |
| Virginia and Maryland | 10,000 00 | 10,000 00 | — | |
| Elk River | 6,000 00 | 6,000 00 | — | |
| Total | \$ 78,000 00 | \$ 76,612 50 | \$ 1,387 50 | |

| Date of Act. | CLASS 4—Navigation Companies. | | | |
|----------------------------------|---------------------------------------|---------------------|-----------------------|--|
| | Amount of the Ap- propriations. | Amount Expended. | Amount Unexpended. | |
| Coal River Company | \$ 96,000 00 | \$ 96,000 00 | \$ — | |
| Guyandotte River Company | 120,000 00 | 106,800 00 | 13,200 00 | |
| Tug Fork River Company | 5,040 50 | 5,040 00 | — | |
| Total Navigation Companies | \$ 221,040 00 | \$ 207,840 00 | \$ 13,200 00 | |

STATEMENT F.—Continued.

| Class 5—Railroads. | |
|--|---------------|
| There is but one item of expenditure under this head, viz: The appropriation for the Covington & Ohio Railroad, say..... | \$ 500,000 00 |

| Class 6—Miscellaneous. | |
|---|---------------|
| Stock of Virginia in West Virginia Bonds..... | \$ 530,000 00 |
| The Lunatic Asylum at Weston..... | 125,000 00 |
| The Lewisburg Law Library..... | 20,000 00 |
| | \$ 684,000 00 |

TABLE J.

Showing the pro rata expenditures in Virginia on account of certain of the foregoing improvements that lie in both States.

| | |
|---|---------------|
| Hardy and Winchester..... | \$ 11,700 00 |
| Hillsborough and Harper's Ferry..... | 1,800 00 |
| Martinsburg and Winchester..... | 13,500 00 |
| Millwood and Berryville..... | 4,500 00 |
| Franklin and Monterey..... | 7,000 00 |
| Northwestern Turnpike..... | 38,192 40 |
| Staunton and Parkersburg..... | 91,205 50 |
| Berryville and Charlestown..... | 6,000 00 |
| * It is understood that this road has been sold by the State of Virginia. | \$ 176,938 00 |

RECAPITULATION.

| | Amount of the Ap- propriations. | Amount Expended. | Amount Unexpended. |
|--|---------------------------------------|---------------------|-----------------------|
| Total expenditures on account of Joint Stock Turnpikes..... | \$ 1,178,620 14 | \$ 966,196 32 | \$ 202,423 82 |
| Roads constructed on State account..... | 1,185,024 41 | 1,145,619 07 | 39,405 34 |
| Bridge companies..... | 78,000 00 | 76,612 50 | 1,387 50 |
| Navigation companies..... | 221,040 00 | 207,840 00 | 13,200 00 |
| Railroads..... | 500,000 00 | 500,000 00 | |
| Miscellaneous..... | 684,600 00 | 684,600 00 | |
| Total..... | \$ 3,777,284 55 | \$ 3,520,807 80 | \$ 256,476 65 |
| From these deduct on account of Virginia's pro-rata for certain expenditures as given in Table 1—Statement F..... | | 176,938 60 | |
| Leaving a total expenditure in West Virginia of..... | | 3,343,869 20 | |
| Deducting from this total the stock of Virginia in West Virginia Banks, and the value of the Lewisburg Law Library, as given in Class 6, viz..... | | 556,600 00 | |
| And we have left as the total expenditure in West Virginia on account of Public Improvements..... | | \$ 2,787,269 20 | |

NOTE. It does not appear from any documents examined what exact proportion of this \$3,343,869.20 enters into the bonded debt of Virginia, and what proportion was paid out of the current revenue. That matter is left open for settlement hereafter.

STATEMENT G.

Showing the property and other assets of the State of Virginia on the first day of January, 1861, not included in any of the foregoing tables:

| | |
|---|-----------------|
| Lunatic Asylum at Williamsburg..... | |
| Staunton | |
| Deaf, Dumb and Blind Asylum at Staunton..... | |
| Virginia Military Institute at Lexington | |
| University of Virginia at Charlottesville | |
| Penitentiary of Virginia at Richmond..... | |
| Armory | |
| Capitol and public grounds | |
| Governor's House | |
| Public miscellaneous library | |
| law | |
| Total..... | \$ 3,875,000 00 |

OTHER ASSETS.

By a provision of an act of Congress of June 23, 1836, there was directed to be deposited with the State of Virginia, of the surplus revenue of United States, \$2,937,237.34.

And it appears by the document number 52 of the session of 1839-40, that of the amount there was actually received by Virginia and subscribed to the stock of certain banks of the State, the following amount, say, \$1,932,809.33.

Whether the residue of this sum was ever paid to Virginia, the Commissioners have not ascertained.

The Literary Fund, as given in document No. 4, Second Auditor's Report of September, 1844, is \$1,509,853.16.

This fund is given as it stood many years ago. By the first of January, 1861, it had probably increased, from fines, forfeitures, and amercements, one or two hundred thousand dollars.

STATEMENT II.—BANKS.

Settlement showing the amount of stock owned by the State of Virginia in the several banks in the year 1810, and how that stock was paid for.

| In What Banks. | In What Name Held. | | | Total Number of Shares. | Par Value of Shares. |
|--|---------------------|------------------------|----------------|-------------------------|----------------------|
| | Commonwealth of Va. | Board of Public Works. | Literary Fund. | | |
| (A) Bank of Virginia..... | \$ 3,250 | \$ 3,365 | \$ 2,121 | 13,736 | \$1,373,600 |
| (B) Farmers' Bank of Virginia..... | 5,050 | 3,442 | 1,054 | 9,546 | 954,000 |
| (C) Bank of the Valley of Virginia.... | 3,700 | 1,000 | 52 | 4,792 | 479,200 |
| (D) Northwestern Bank of Virginia..... | 4,000 | 271 | 500 | 4,771 | 477,100 |
| (E) Exchange Bank of Virginia..... | 9,000 | 50 | ..... | 9,059 | 905,900 |
| (F) Merchants and Mechanics' Bank of Wheeling..... | ..... | 125 | ..... | 125 | 12,500 |
| | \$ 25,000 | \$ 13,262 | \$ 3,727 | 42,029 | \$4,302,900 |

NOTES.—(A) Bank of Virginia—Subscribed by the Commonwealth per act of 30th January, 1804, payable in ten annual installments, to meet which the tax on merchant's license and dividends on the stock itself was pledged. The dividends during the time amounted to\$ 300,000 00
 Bonds and profit on sale of new stock of the bank, under act 20th January 1814 494,700 00
 Purchased out of the disposable funds of the board of Public Works.. 41,800 00
 Purchased out of the permanent capital of the Literary Fund..... 205,600 00
 Out of undrawn school quotas in treasury 6,500 00
 Subscribed and paid for out of the United States surplus revenue on deposit in the treasury 325,000 00
 \$1,373,600 00

(B)—Farmers' Bank of Virginia.

Bonus under act 13th February, 1812\$ 333,400 00
 Purchased out of permanent fund of the Board of Public Works..... 4,700 00
 Out of the disposable funds of the same 6,100 00
 Out of the permanent capital of the Literary Fund 105,400 00
 Subscribed and paid for out of the United States surplus revenue on deposit 505,000 00
 \$ 954,600 00

(C)—Bank of the Valley.

Bonus under act February, 1817\$ 90,000 00
 Purchased out of the disposable funds of Board of Public Works..... 100,000 00
 Purchased out of permanent capital of Literary Fund 9,200 00
 Paid out of United States surplus revenue 370,000 00
 \$ 569,200 00

(D)—Northwestern Bank.

Bonus under act 5th February, 1817\$ 23,100 00
 Bonus under act 25th March, 1837 4,000 00
 Paid out of United States surplus revenue 282,809 33
 Paid for dividends of stock itself 24,908 67
 Paid for State's 6 per cent scrip 92,282 00
 Paid for out of permanent capital of the Literary Fund 50,000 00
 \$ 477,100 00

STATEMENT H—Continued.

(E)—Exchange Bank of Virginia.

| | |
|---|--------------|
| Bonus under act 25th March, 1837 | \$ 5,900 00 |
| Paid for out of United States revenue | 450,000 00 |
| Paid for in State's 6 per cent scrip | 295,000 00 |
| Due on subscription of \$900,000 by Commonwealth, \$155,000, which was subsequently paid | 155,000 00 |
| | <hr/> |
| | \$905,900 00 |

(F.)—Merchants' and Mechanics' Bank of Wheeling

| | |
|--|-----------|
| Bonus under act of 7th March, 1834 | 12,500 00 |
|--|-----------|

REPORT OF THE SENATE FINANCE COMMITTEE OF 1873.

STATE OF WEST VIRGINIA, {
CHARLESTON, December 22, 1873. }

The attention of the Committee on Finance has been repeatedly called by resolutions introduced in the Senate and otherwise, to the subject of Virginia's public debt and the share which it is equitable for West Virginia to bear and pay. The committee under these frequent promptings have been constrained to give the subject their most earnest and careful attention as a matter fraught with more than ordinary consequence to the State, and have come to a conclusion satisfactory to themselves, and it is believed that the conclusion of the committee will be approved by the judgment of the people interested, and will receive the sanction of any tribunal before whom it may be brought for adjudication.

It is necessary to a full understanding of this subject that reference be had to the treaty stipulations or fundamental conditions, by whatsoever name they may be called, between the representatives of the people of Virginia and the people desiring separation, by the creation of a new State, which led to the formation of a constitution, its adoption by the people and its approval by Congress, and the establishment of the State of West Virginia.

The ninth section of "an ordinance to provide for the formation of a new State out of a portion of the territory of this State," [Virginia] passed August 20, 1861, provided, that "the new State shall take upon itself a just proportion of the public debt of the commonwealth of Virginia *prior to the first day of January, 1861*, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of the debt was contracted; and deducting therefrom the monies paid into the treasury of the commonwealth from the counties included within the said new State during the same period."

Upon compliance with the conditions contained in the ninth section and here quoted the people within the counties now constituting West Virginia, were authorized to form a constitution to be presented to Congress for its approval and for the admission of the new State into the Union.

Accordingly a constitution was adopted by a convention of the people from the several counties now constituting the State of West Virginia and to carefully guard and secure the rights prescribed by Virginia as a condition precedent to the formation of the new State, a provision was incorporated into it to secure the exact fulfillment of the treaty stipulations as aforesaid.

By article eight, section eight of the constitution, it was provided that "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State and that the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation

thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This subject has received a careful consideration by commissioners appointed by authority of this State, and while this committee see much to approve in the Report of the Debt Commissioners of West Virginia on this subject for their great research and the ability with which they handled the subject, considering the peculiar difficulties under which they labored, as shown in their report, and in the illustration of the many problems that may rise in the discussion of this subject, yet this committee think the controlling question has not been discussed by the Commissioners by reason of the embarrassment surrounding their action; and the Committee beg leave to refer to the report which is appended hereto and marked No. 1.

In construing the legal principles involved in this matter, it may be assumed that a private creditor of Virginia cannot sue West Virginia for contribution; for that is prohibited by the Constitution of the United States; see article eleven of amendments United States Constitution which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens or subjects of any foreign State." But notwithstanding this prohibition the third article extends the judicial power of the Supreme Court to controversies between two or more States. Under this provision of the Constitution it is within the power of Virginia to institute and prosecute any suit against West Virginia touching the controversies respecting the public debt.

If the conditions precedent to our admission as a State, prescribed by Virginia herself, be accepted as a true basis of adjustment and final settlement, Virginia's claims for expenditures can very properly be offset by our contributions.

Upon this basis the whole subject is one of easy solution, containing no other items than that of creditor or debtor with balances to be struck upon agreed principles. The legislative history of Virginia establishes beyond a doubt that the first act of assembly to create a debt or issue a bond was passed in the year 1821, and the executive records show that the first bond issued by the commonwealth of Virginia was in the year 1822.

From this latter period we date the commencement of our liability under the fundamental stipulations prescribed by Virginia for our separation, which were accepted by the people of this State, approved by Congress, and the President of the United States, as the head of the executive department, and subsequently affirmed by the Supreme Court of the United States, and may at this day be accepted by the public as firmly engrafted into obligations and rights as if the same were constitutional provisions emanating from the supreme power.

The concurrent approval, binding alike upon the people of Virginia and West Virginia, lead us to the following conclusions which are the results of a mathematical demonstration, founded upon pub-

lie and official records, appropriate to determine how much of the bonded debt of Virginia existing prior to January, 1861, was expended within the limits of this State, and how much was contributed by the counties forming the same.

The report of the Debt Commissioners hereinbefore referred to shows that all State expenditures within this State prior to January, 1861, amounted to \$3,366,929.29, and although it is apparent that bonds for quite a large amount of this sum were never issued, nevertheless the expenditures would seem to import an obligation upon our people to return every dollar which has been so contributed to the development of the territory of our State.

The committee have not entered into the tedious process of calculating the interest, for the obvious reason that there would be as much interest on our contributions to as upon the receipts of Virginia.

The committee have therefore assumed the foregoing sum of \$3,366,929.29 as importing a debt upon West Virginia to be gathered and itemized from the report of the Debt Commissioners aforesaid.

From the amount of the foregoing expenditures must be deducted the moneys paid into the Treasury of the Commonwealth of Virginia, from the counties included in this State during the same period. For the sake of convenience the committee have charged to Virginia, not the whole contribution, but the surplus after deducting a just proportion of the ordinary expenses of the State government. Our total contributions from taxes to the State of Virginia in the year 1822, amounted to \$63,000; and in that year the total of the expenses of the State government chargeable to us was \$47,000, leaving an excess of \$16,000, which would go to the liquidation of the debt created for expenditures within our midst.

This small surplus in 1822, by the process of an increased rate of taxation, and the increased value of the subjects to be taxed, the rate rising from 8 cents to 40 cents on every one hundred dollars in value, made the excess of our contributions to the treasury of Virginia in the year 1860 amount to \$512,000, rejecting fractions.

Thus our contributions to the treasury of Virginia arising from taxes collected in that year amounted to \$647,079.96. In the same year our proportion of the ordinary expenses of government amounted to \$135,000, which left the surplus aforesaid of \$512,079.96. It will be observed that the committee have referred only to the surplus in 1822 and in 1860. The surplus for the intermediate periods swell the aggregate of our contributions to \$3,892,000 which is in excess of expenditures within our limits by \$525,000.

It will thus be seen that our state is not indebted and the Committee confidently advance this statement, not only as containing the true basis of settlement between the two States, but it is supported by incontrovertible facts, by conditions precedent prescribed by Virginia under the restored government which government has been approved as aforesaid by Congress, by the Executive and by the Supreme Court of the United States.

Notwithstanding the satisfactory condition of our finances and our material resources, the attention of the committee has been called to the fact that "West Virginia certificates" and "West Virginia bonds" are quoted at the marketable value of from five to fifteen cents on the dollar, in money of the stock exchanges and markets of the United States. This of course has a tendency to depreciate the just credit to which this State is entitled. For it is acknowledged that the credit of a State depends upon the value of its taxable property, the amount of its indebtedness and above all upon its punctuality in meeting its engagements. These quotations imply two things: first, that we owe a debt; second, that we are either unable or unwilling to pay the debt which beget a want of confidence in the minds of the public who are uninformed with respect to the true condition of West Virginia; and operate unjustly and injuriously upon us. It would seem to be enough for us to say, and we make the assertion without the fear of contradiction, that we owe no debt, that we have issued no bonds and our Constitution forbids the creation of a liability in the nature of a public debt; and with this assurance we cannot demand more nor expect less of all honorable stock brokers and bankers than the withdrawal from the list of indebted states the name of West Virginia.

"West Virginia certificates" and "West Virginia bonds" do not exist. No bonds have ever at any time been issued by West Virginia and we are prohibited from issuing at any time hereafter any bonds on the faith of this State. The bonds or certificates referred to were issued by Virginia, and West Virginia had no agency or participation therein.

In respect to the credit which our conduct and property would imply, we might be indifferent, but we have higher aims and more ennobling ambition. We desire to invite immigration, to cultivate our forests and to develop our mineral resources; this cannot be done with success, when men of thrift and capital are deterred from immigrating to and within our borders by reason of the persistent and unjustifiable misquotations of our credit. No one could be expected to invest capital within a State which has so far absorbed the substance of the people thereof that its good faith and obligations were only worth five cents on the dollar. West Virginia owes no debt, has no bonds for sale and asks no credit.

J. M. BENNETT,

Chairman.

JOHN W. GRANTHAM,

A. E. SUMMERS,

J. T. MCCLASKEY,

R. B. SHERRARD,

ELLIOTT VAWTER.

House Joint Resolution No. 10, Concerning the Virginia Debt.

(Adopted February 7th, 1895)

Resolved by the Legislature of West Virginia:

That this Legislature hereby declines to enter into any negotiation with the debt commissioners, or commission appointed under a joint resolution, adopted by the General Assembly of Virginia, in the month of March, 1894, looking to the settlement of the Virginia debt question, on the basis set forth in said joint resolution.

HOUSE JOINT RESOLUTION NO. 3.

(Adopted January 21, 1897.)

A resolution relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that West Virginia does not owe one cent of the so called "Virginia debt," and that this Legislature is opposed to any negotiations on that subject.

(H. J. R. No. 6)

JOINT RESOLUTION NO. 3.

(Adopted January 21, 1899)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That this legislature declines and refuses to take any action in regard to what is known as the Virginia debt, or Virginia deferred certificates, either by considering any propositions of adjustment or settlement, so called, or by authorizing the appointment of any committee or committees having for their purpose the consideration of the same; and that it is the sense of this legislature that the State of West Virginia is in no way obligated for the payment of any portion of the said debt or certificates.

(S. J. R. No. 2.)

JOINT RESOLUTION NO. 21.

(Adopted January 16, 1901.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That this legislature declines and refuses to take any action in re-

gard to what is known as the Virginia Debt, or Virginia Deferred Certificates, either by considering any proposition of adjustment for settlement so called, or by authorizing the appointment of any committee, or committees, having for their purpose the consideration of the same.

And, That it is the sense of the Legislature that the State of West Virginia is in no way obligated for the payment of any portion of the said debt, or certificates.

(H. J. R. No. 3.)

JOINT RESOLUTION NO. 3.

(Adopted January 21, 1903.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That it is the sense of this legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this legislature is opposed to any negotiations whatsoever on that subject. And, *further*, that this legislature declines, and most emphatically refuses, to take any action in regard to what is known as the Old Virginia debt, or Virginia deferred certificates, either by the consideration of a proposition of adjustment for settlement, or by authorizing the appointment of any committee or committees having for their object or purpose the consideration of same; and that it is the sense of this legislature that the State of West Virginia is in no way or manner obligated, either morally or legally, for the payment of any portion of the said debt or certificates. Nor do we owe any other state or territory in this Union.

(H. J. R. No. 7)

JOINT RESOLUTION NO. 3.

(Adopted January 20, 1905.)

Relating to the Virginia debt.

Resolved by the Legislature of West Virginia:

That it is the sense of this legislature that the state of West Virginia does not owe any part of the so-called Virginia debt, and that this legislature is opposed to any negotiations whatsoever on that subject.

AN ACT to provide for the defense of the equity suit of the Commonwealth of Virginia against the State of West Virginia, now

pending in the supreme court of the United States, and appropriate money for such purposes.

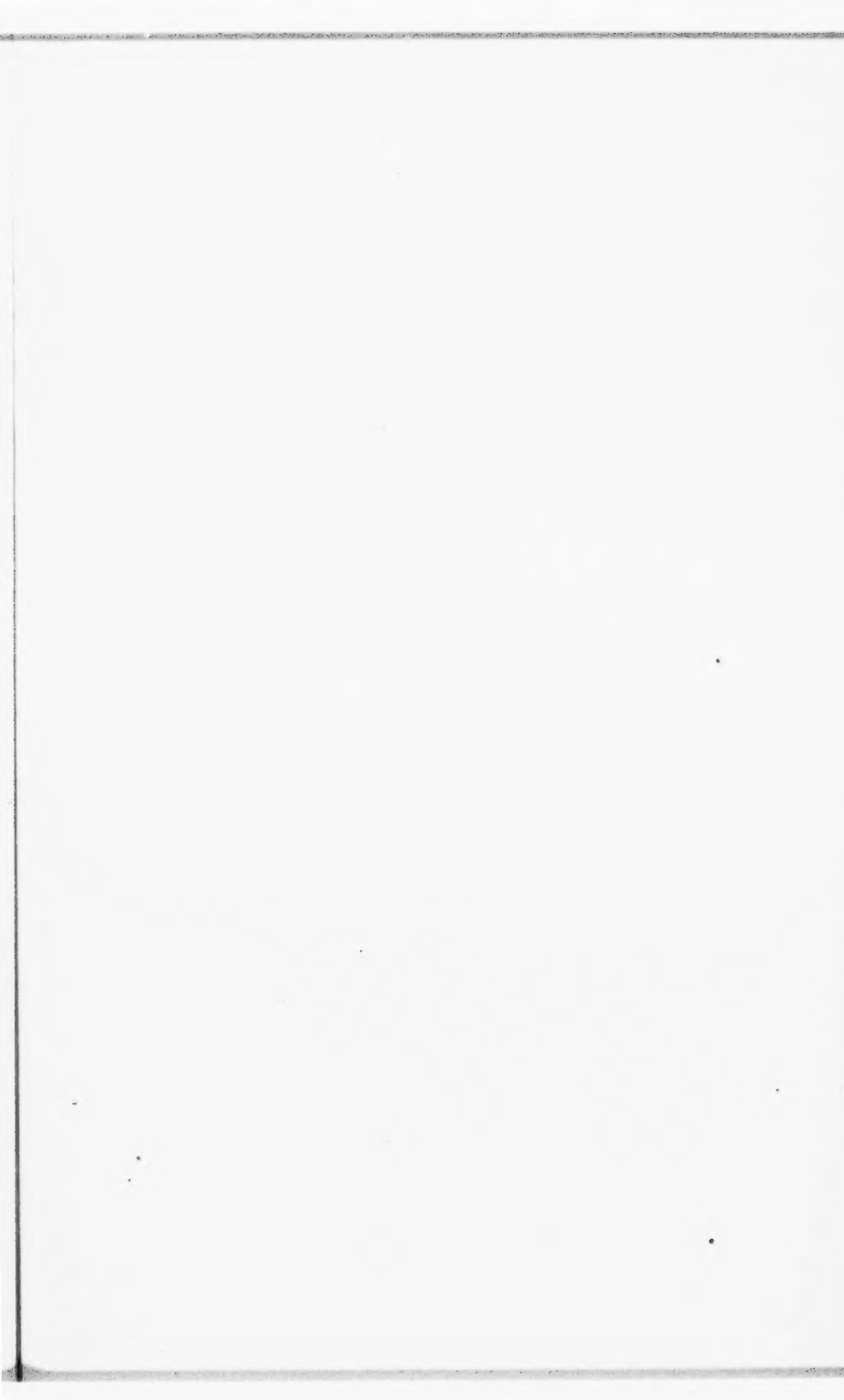
Passed February 4, 1907.

Be it enacted by the Legislature of West Virginia:

Sec. 1. That the attorney general of West Virginia be and he is hereby authorized and directed to defend the equity cause of the Commonwealth of Virginia against the State of West Virginia now pending in the supreme court of the United States; and the board of public works is hereby authorized to employ such attorneys and agents to assist the attorney general in the defense of such suit as in its judgment shall be necessary for the purpose.

Sec. 2. The attorney general is further authorized and directed to have made as soon as possible such searches and investigations as may be necessary to ascertain all the facts, which in his opinion, are needed for the proper defense of said suit; and the attorney general is further authorized, if in his opinion it is necessary, to request of the officers of the said Commonwealth of Virginia reasonable access to the records of said Commonwealth so far as it may be necessary for such purpose; and to cause such copies and extracts of such records made as he or his associates may deem necessary for such purpose; and the attorney general is directed to make full and complete reports of his acts hereunder to the board of public works, from time to time, as he may deem proper or as requested by said board, and to the legislature at each session thereof during the pendency of this suit.

Sec. 3. To carry out the provisions of this act, the sum of fifty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, to be paid out of the treasury from time to time on the requisition of the board of public works.



Compliments of

Wm. G. Conley,

Attorney General.

PROCEEDINGS
IN THE
EQUITY SUIT
OF THE
Commonwealth of Virginia
VS.
The State of West Virginia,
WITH AN APPENDIX.

VOLUME II.

COMPILED BY
WILLIAM G. CONLEY, Attorney General.



Charleston;
TRIBUNE PRINTING CO.,
1938.



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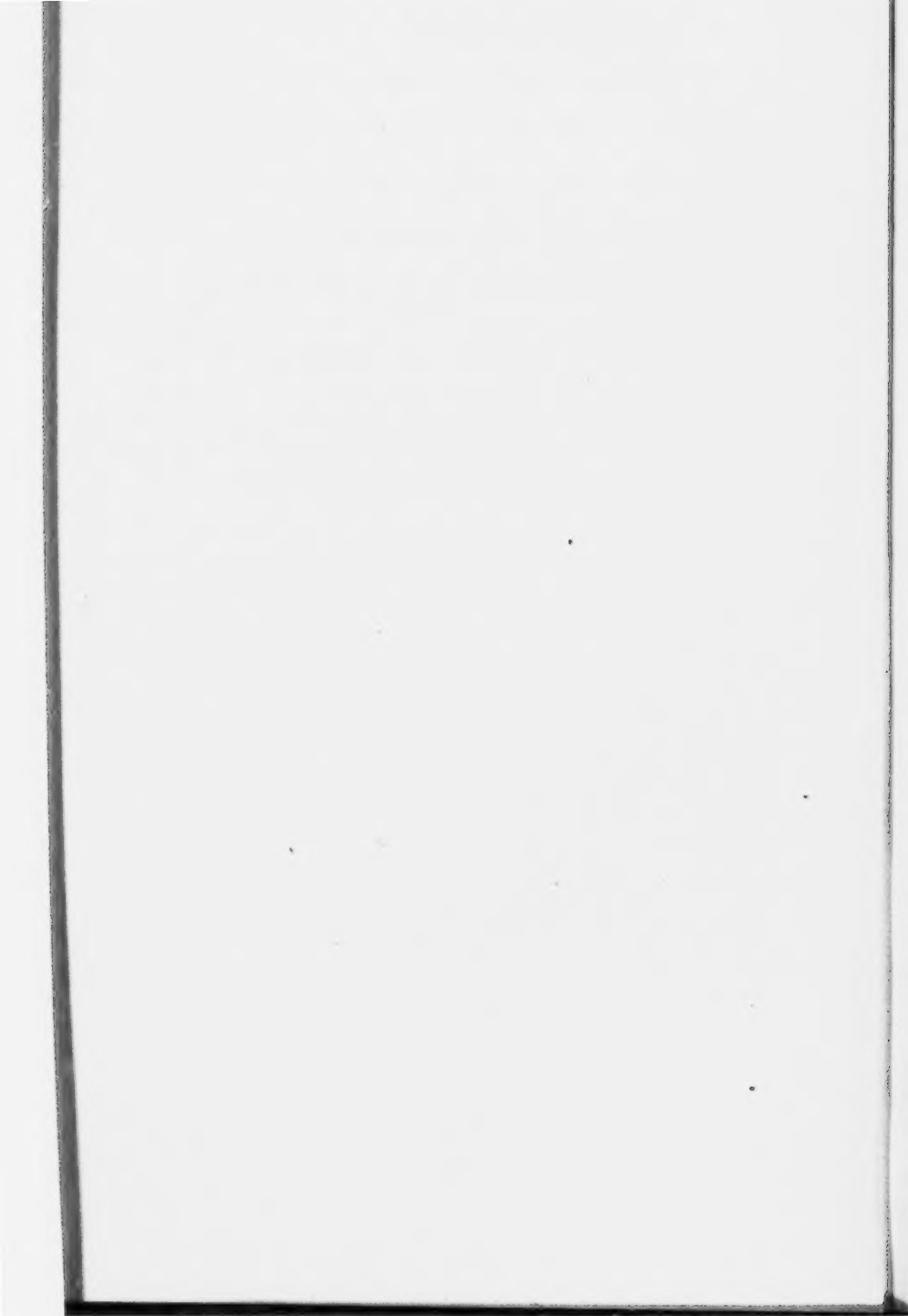
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INTRODUCTION

There will be found in this volume all of the proceedings had in the chancery cause of the Commonwealth of Virginia *versus* the State of West Virginia, now pending in the Supreme Court of the United States, since the publication of Volume I, which ended with the decree overruling the defendant's demurrer to the plaintiff's bill.

This volume begins with the defendant's answer and includes arguments of counsel, the decree of the Court referring the cause to a Master, the amendments made to said decree on the petition of the defendant, and the appointment of Congressman CHARLES E. LITTLEFIELD, of the State of Maine, as Master in said cause.

There is appended to this volume parts of the speeches of Hon. WAITMAN T. WILLEY, United States Senator, and Congressmen WM. G. BROWN and JACOB B. BLAIR, made in the Congress of the United States, on the admission of West Virginia into the Union. These speeches show some of the reasons why the counties west of the Allegheny Mountains were demanding to be separated from those counties east of said mountains. The appendix also contains Judge JOHN W. MASON's letter to Governor DAWSON, and what is commonly known as Senate Joint Resolution No. 14, but is reported in the Acts of the Extraordinary Session of the Legislature of 1908, as "Substitute for House Joint Resolution No. 25," creating a non-partisan committee of citizens and property holders to advise with the Board of Public Works as to the matters involved in said suit.

The Board of Public Works, under chapter 45, Acts of the Legislature, 1907, and since Volume I. was printed, has employed Hon. JOHN C. SPOONER, late a United States Senator from Wisconsin, as an additional associate counsel to assist in the defense of said suit. Expert accountants are also employed and are at work to ascertain the true state of accounts.

The hearing before the Master will begin in said suit at Richmond, Virginia, November 9, 1908. This date was fixed upon by

INTRODUCTION.

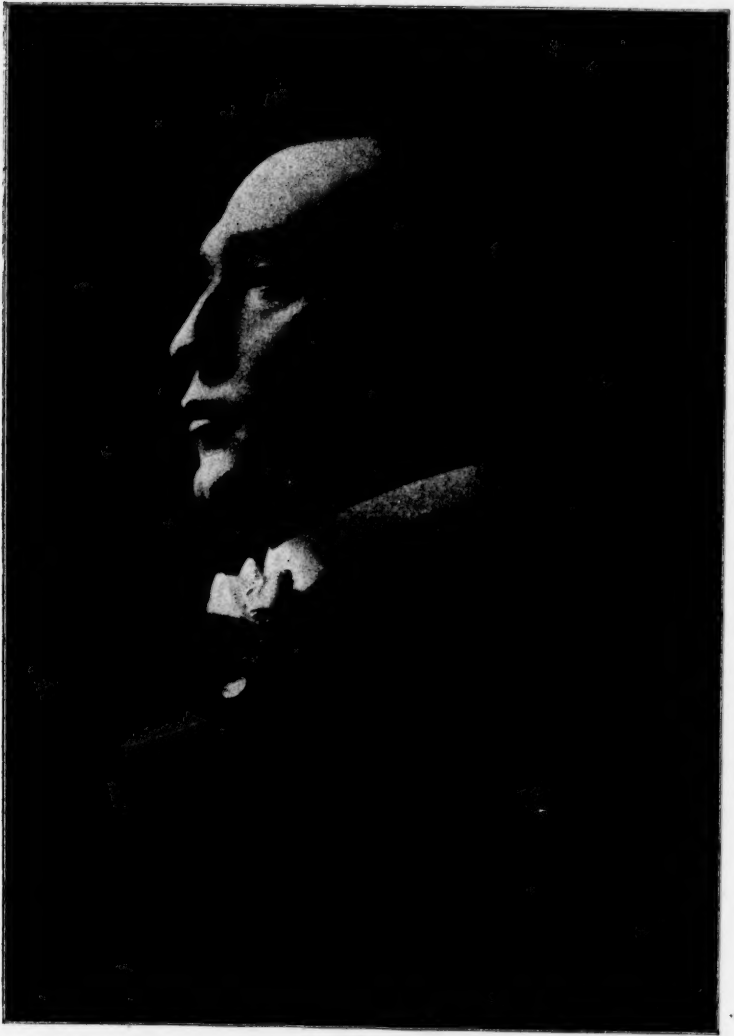
the Master that both sides might have time to properly prepare for the contest.

The best legal ability and expert accountants in the country have been employed to assist in the defense of this suit, and the people of this State may rest assured their interests therein are being efficiently and honestly protected.

Respectfully submitted,

WM. G. CONLEY,
Attorney General.

Charleston, W. Va.,
August 17, 1908.



HON. CLARKE W. MAY,
LATE ATTORNEY GENERAL OF WEST VIRGINIA.



DEATH OF GENERAL MAY.

Attorney General CLARKE W. MAY, one of the best known men in public life in West Virginia, died at 6:30 o'clock Saturday morning, April 25, 1908, at his home at Hamlin, Lincoln County, as the result of blood poisoning arising from injuries received in a runaway ten days before. Friday night, April 24th, about 9 o'clock his right leg, which sustained a compound fracture in the accident, was amputated just below the knee. General May rallied after the operation, but toward morning he took a change for the worse, and, at 6:30 o'clock, peacefully passed away.

Attorney General May was born at Griffithsville, Lincoln county, July 14, 1869. He was educated in the common schools of that county. Left on his own resources at the age of sixteen by the death of his father, he began the battle of life, having nothing to aid him but ambition and energy. In 1894 he completed the law course at the State University and began the practice of his profession in his home county. In 1896, at the age of 26, he was elected the first Republican Prosecuting Attorney of Lincoln county. In 1900 he was elected to the State Senate by over 2,500 majority. In 1903 he was the unanimous choice of his party for President of the Senate. At the Republican convention of 1904, held at Wheeling, he was nominated for Attorney General and was elected by a large majority. After his election as Attorney General, he moved to Charleston and gave to the duties of the office his entire time.

In the death of General May the State lost a man it can ill afford to lose. While an active partisan, he

was one of those royal good fellows who did not think it a crime to pass a flower over the dividing wall between political parties. He loved his fellow-man and enjoyed the social side of life. He had a strong mind and was a successful lawyer, and only a few weeks before his death fortune began to smile upon him in a financial way. By the discovery of oil near Griffithsville, on a tract which he had held for years, he realized an income which, with the drilling of other oil wells would have made him financially independent.

He was a candidate for re-election as Attorney General and it is the opinion of many of his party associates that he would have been re-nominated by his party had he lived. It seems indeed sad that with his political prospects satisfactory, his professional career most promising and financial success assured he should be cut off while yet a young man. The State needs such men and his loss is greatly felt.

During the last two years Mr. May had spent much time in untangling the old Virginia Debt skein, and it is owing altogether to his indefatigable effort and his high ability that this question has been brought to the semblance of intelligence it now assumes. Senator John C. Spooner, who was associated with General May in this suit, has this to say of him: "The death of Attorney General May is a great shock to me. I had come to regard him as a very able lawyer, zealous and watchful in safeguarding the interests of the State, and any other client with whose business he might be intrusted, and an absolutely honest man. West Virginia sustains a serious loss."

IN THE SUPREME COURT OF THE UNITED STATES.

ORIGINAL NO. 7.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

ANSWER OF WEST VIRGINIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The answer of the State of West Virginia, by William M. O. Dawson, Governor, and Clarke W. May, Attorney General, by leave of this Honorable Court, to the bill of complaint exhibited against said State of West Virginia by William A. Anderson, Attorney General, for and on behalf of the State of Virginia.

This defendant, now and at all times hereafter saving to herself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or so much thereof as this defendant is advised is material or necessary for her to make answer to, answering, says:

I

That she believes it is true as alleged that on the first day of January, 1861, plaintiff was indebted in "about" the sum of \$33,000,000, upon obligations and contracts made in connection with the construction of works of internal improvement within her then territory; and it may be true that the greater part of said indebt-

edness was shown by her bonds and other evidences of debt, given for the large sums of money which she from time to time had borrowed and used for said purpose; and it may also be true that all her liabilities, though arising under contracts made before that date, had not then been covered by bonds issued for their payment; but as to this allegation respondent has no knowledge or information except what is derived from said bill. This respondent denies that there was in addition to the above mentioned liability to the general public any other indebtedness evidenced by bonds held by and due to the Commissioners of the Sinking Fund and Literary Fund of the said State of Virginia as created under her laws, amounting the former to \$1,462,993, and the latter to \$1,543,669.05, or to any other sums, as of the same date, as in the said bill is alleged, because this defendant avers that the commissioners of these two funds were and are mere State agencies, and public officials of the State, created by said State of Virginia to have the custody of and to preserve certain of her financial resources and obligations to be made available for specific purposes when necessary, and which now belong exclusively to Virginia and are held for her sole and exclusive use and benefit. Respondent denies that any of the bonds or certificates so alleged to be held by the Commissioners of the Sinking Fund and the Literary Fund were ever negotiated or sold by the State of Virginia, or that the same constituted a part of the public debt of that State on the first day of January, 1861, and denies that the certificates representing one-third of such bonds are now a part of the said public debt; and respondent avers that the State of Virginia has long since voluntarily canceled all of said bonds and the same are no longer of any force or validity.

II.

It is true as alleged that said portion of the territory which now constitutes the present State of Virginia was, prior to January 1, 1861, devoted mainly to agriculture, and, to some extent, to grazing and manufacture, which afforded its chief source of revenue at that time; but this defendant avers that the territory which now composes the State of Virginia was largely underlaid with rich and valuable minerals only awaiting the opportunity and means of development to make the said State exceedingly wealthy in varied mineral resources such as coal, iron, manganese and other valuable and marketable products, and the said State abounded at that time in large forests of valuable timber which have since developed into

a great source of revenue to the said State and its citizens. It is true that the portion included in what now constitutes the State of West Virginia had vast potentialities of wealth and revenue in undeveloped stores of mineral and timber, and respondent avers that the same was inaccessible and of very little value on the first day of January, 1861, and during all the years prior thereto, and that it has been only within recent years that the development of said resources has been begun in the said State of West Virginia, and this required the outlay of many millions of dollars, since January 1, 1861, in the construction of railroads and other public works and the appropriation by the Congress of the United States of many more millions of dollars for the improvement of her waterways in order to afford an outlet for her mineral and other products. This respondent denies that the prime object of the State of Virginia in entering upon a system of internal improvement was to hasten and facilitate the development of the resources of wealth and revenue in West Virginia by the construction of graded roads, bridges, canals and railways extending through the then State of Virginia from tidewater toward the Ohio river, and avers that the main object of said system of internal improvements was to afford the eastern part of the State an outlet for its own products to the Ohio river on the west and to the seaboard on the east, and to afford convenient communication with those points so as to create a market for such products at points on the eastern coast of Virginia at tidewater, and thus open up and develop the resources of the territory now constituting the State of Virginia, and not, as alleged in said bill, for the purposes of developing the resources of the western part of her territory, now constituting the State of West Virginia. This respondent further says that it is true as alleged in said bill that the larger portion of these public works was constructed east of the Appalachian range of mountains and within the present territorial limits of Virginia, and respondent avers that nearly all of the money derived from the sale of the bonds was in fact expended in the development and improvement of what now constitutes Virginia, and only a comparatively small sum was expended in developing, and improving the portion now composing West Virginia; that these expenditures in Virginia were of very little practical benefit to the people living in the western part of the State up to and including the first day of January, 1861. This respondent further says that it is true that property values within the limits of West Virginia have been largely increased since 1861, but denies

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that such increase was caused by the improvements made within her present territory prior to 1861, but nearly all of the improvements and developments of resources in said State have been made within the last twenty-five years and are due to railroads and other public works constructed by her own people and by private capital brought within her territory and by appropriations made by Congress, and are almost entirely disconnected and independent of any expenditures made by Virginia prior to January 1, 1861, either by the proceeds of bonds issued and sold by her or from any other means derived from the creation of any debt by her. Respondent admits that the money appropriated and the payment of the annually accruing interest on said debt prior to January 1, 1861, and to the formation of the Sinking Fund for the ultimate redemption thereof was derived from taxes imposed upon property subject to taxation throughout the entire state, but respondent avers that the large amount thus derived from taxation to which the present State of West Virginia, then a part of Virginia, contributed her full share, was not kept intact by the State of Virginia after her ordinance of secession from the union in the year 1861, but was used by her in the administration of the so-called State Government at Richmond and for many other purposes while she claimed to be a part of the Confederate States of America, and that the part of the Sinking Fund so expended should be accounted for to this State and constitute a credit to her in the settlement of her equitable proportion of said debt; this respondent calls upon the State of Virginia to show what the aggregate amount of said Sinking Fund was on the first day of January, 1861, and of what it consisted, together with the interest thereon since accruing, and that she shall be required to give credit to this respondent for the amount contributed thereto by her prior to January, 1861, in case this court shall determine that an accounting shall be had between the said States in this action.

III.

This respondent denies that the Commonwealth of Virginia was induced to enter upon the construction of her general system of improvement, in a very large measure, for the purpose of developing the aforesaid resources of the western portion of the State, now constituting the State of West Virginia, and thereby as alleged in said bill, ameliorating the condition of her citizens residing therein, and denies that it was with this view that she took upon herself

the alleged burden of her public debt, for which her bonds were issued, without which debt, it is alleged, said improvements could not have been undertaken. The respondent avers that Virginia appropriated to her own use, within the territory now constituting the present state of Virginia, about nine-tenths of all the money derived from the proceeds of said bonds, and that this large part of said proceeds enured to the sole benefit of the people living in what now constitutes the State of Virginia, while the territory now constituting the State of West Virginia received but a small proportional part thereof, and that all the money appropriated was expended under and by direction of the officers of the State of Virginia who were elected and controlled by the voters then living within the present limits of that State.

It may be true that a majority of the representatives residing in that part of Virginia now composing the State of West Virginia voted for the appropriations for the said public improvements, but if so, it was with the expectation and belief that an equitable proportion thereof would be expended in their section of the State which, as hereinbefore averred, was not done; and at the times when said debt was created the Legislature was in the absolute control of the very large majority of members chosen by the people living within what now constitutes the State of Virginia and they could, and actually did, control the legislation of the State.

IV.

It may be true that the development of this system of public improvements was, from its character and extent, progressive, as is alleged, and that the same extended with the general growth and increasing needs of the State, and was incomplete in 1861; but this respondent denies that prior to that time a very considerable portion of such improvements had been constructed in the territory now constituting West Virginia in order to meet the needs of the people of that portion of the State for their local purposes. On the contrary, the principal object of the State in entering upon this system was for the construction of a canal from the James River to the Ohio River for the purpose of connecting the Virginia seaboard with the western waters, the building of certain railroads projected in the same direction and in certain other directions, all within the present territorial limits of the State of Virginia, and for the construction of highways and bridges and certain public buildings, nearly all of which were located and constructed within

the present limits of the State of Virginia. It is true, as alleged, that the expenditures of this money were under the direction and control of the Board of Public Works, the members of which were elected by the voters of the State at large, but respondent avers that this Board of Public Works was at all times composed of a majority of members residing within the present limits of Virginia and that only such members were chosen as were acceptable to the people residing within the present limits of Virginia and to promote their views and interests as to the method and policy of the expenditures of said moneys.

V.

It is true that on the 17th day of April, 1861, the people of Virginia in general convention assembled adopted an ordinance by which it was intended to withdraw Virginia from the union of the States, and it is also true that a considerable portion of the people of Virginia dissented from this action and that a great majority of the people residing in the territory now composing the State of West Virginia opposed the action thus taken by the people of Virginia then residing within the present territorial limits of that State, and representatives of the people organized a separate government within the territorial limits of Virginia, known and recognized by the people now living within the State of Virginia as the "Restored State of Virginia;" and this government was thereafter recognized by the executive and all the other departments of the United States Government and treated as the State of Virginia until long after the close of the Civil War.

VI.

It is also true that on the 20th day of August, 1861, the State of Virginia, in a convention assembled at the city of Wheeling, adopted an ordinance "to provide for the formation of a new state out of a portion of the territory of this State," and that section nine of said ordinance is in the following words:

"The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within

the said new State during the same period. All private right and interests in lands within the proposed State derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of West Virginia."

Section ten of said ordinance provided as follows:

"When the General Assembly shall give its consent to the formation of such new State, it shall forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the said new State may be admitted into the Union of States."

The same ordinance also provided for a convention of the people to be held within the territorial limits of the then State of Virginia by representatives to be selected by a popular vote of the people within the limits of the proposed new State to adopt a constitution for such proposed new State, and the said convention assembled at Wheeling in November, 1861, and framed a constitution which was thereafter duly ratified by a vote of the people, which constitution contained the following provision relating to the public debt of the State of Virginia:

"An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

Subsequently, on the 13th day of May, 1862, an act was passed by the legislature of Virginia giving the consent of that State to the formation and erection of the proposed new State within the jurisdiction and territorial limits of said State of Virginia. Section one of this act provided as follows:

"That the consent of the Legislature of Virginia be, and the same is hereby, given to the formation and erection of the State of West Virginia within the jurisdiction of this State, to include the counties of Hancock, Brooke, Ohio, (and many other counties) according to the boundaries and under the provisions set forth in the Constitution of the said State of West Virginia and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

Section three of said act provided:

“Be it further enacted, That this act shall be transmitted by the executive to the senators and representatives of this Commonwealth in congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of congress to the admission of the State of West Virginia into the union.”

The respondent avers that said act was transmitted to the senators and representatives of Virginia in Congress. A correct copy of the same is attached to this answer and made part hereof as “Exhibit No. 1.”

VII.

This respondent further says that the allegations contained in Paragraph VII of said bill with reference to the act of Congress and the admission of the State of West Virginia into the Union are true.

VIII.

This respondent for further answer to said bill says it is true that pending the admission of the State of West Virginia into the Union the general assembly of the Commonwealth of Virginia passed the act of February 3, 1863, which is set forth in Paragraph VIII of said bill; but this respondent denies that the property which was by this act appropriated and transferred from the Commonwealth of Virginia to the State of West Virginia amounted in the aggregate to several millions of dollars on the 3d day of February, 1863, as in said bill is alleged, and denies that the State of West Virginia realized and received into her treasury from the sale of bank stock alone about \$600,000 as is in said bill alleged.

Respondent denies that she is chargeable for or on account of the transfer of said property, except the stocks of companies or corporations and the credits, or for any part thereof, otherwise than in a settlement with the State of Virginia for this respondent's just proportion of the public debt of that State as provided in the said ordinance of August 20, 1861, and in the said act of February 3, 1863; and respondent avers that she is not chargeable in any settlement for or on account of such stocks or credits with any sum in excess of the actual market value of the same at the times when they were transferred to her; and she avers that at the times when

such stocks and credits were transferred they were greatly depreciated and were of but little value.

IX.

Respondent admits the passage of the act of February 4, 1863, as alleged in Paragraph IX of said bill, but denies that she received, or that it was intended by said act that she should receive, any money except such as had then been collected, or might be thereafter collected, within the territory constituting the present State of West Virginia prior to the admission of the State into the Union, and she denies that she is legally or equitably liable to the plaintiffs for any part thereof, or that said act of the Legislature imposed, or purported to impose, any liability upon her or was so intended or understood. Respondent avers that after the Wheeling Convention and the passage of the ordinance providing for the formation of a new State, the Restored State of Virginia continued to impose and collect taxes in the territory now composing the State of West Virginia until the admission of that State into the Union, and a small part of the money realized by such taxation was returned to the new State under the said act of February 4, 1863, and no other money was appropriated or received under that act.

Respondent avers that nearly the entire amount of revenue collected by the "Restored State of Virginia," prior to the admission of West Virginia into the Union was collected from the counties now constituting the latter State, and that much the largest part of it was expended by the said state government outside of those counties, and that it was only just and equitable that such surplus as might remain at the time of admission into the Union should be restored to her in order that she might be able to install her government, establish courts and preserve order within her limits; and this just and equitable claim was recognized by Virginia when the said act was passed.

X.

This respondent, for further answer to said bill, says that it is true that the Constitution of the State of West Virginia contained the provision, among others, set forth and alleged in Paragraph X of said bill, but this respondent denies that the terms "public debt" or "previous liability" referred to either the property or money formerly belonging to the State of Virginia which had been

transferred to and received by West Virginia under the acts of the general assembly of the Commonwealth of Virginia set forth in Paragraph VIII and Paragraph IX of said bill, for the reason that said constitution was adopted long before the said acts of the general assembly of Virginia were passed, and before the act passed in May, 1862, by the said general assembly of Virginia giving her consent to the formation of the proposed new State out of the territory within her limits. This respondent therefore denies that anything contained in sections 5, 7, or 8 of Article VIII of the Constitution of West Virginia, adopted in 1861, bears any such construction, or is susceptible of any such meaning, as is given thereto by the allegations contained in Paragraph X of plaintiff's said bill.

XI.

This respondent for further answer to said bill says that she denies that the Commonwealth of Virginia made attempts at different times to ascertain and settle the equitable proportion of her public debt to be borne by West Virginia, upon the terms and in the manner contemplated by section nine of the ordinance adopted by the convention of the State of Virginia on the 20th day of August, 1861, in section eight of Article VIII of the Constitution of West Virginia, or in the manner prescribed by either of said instruments. The facts relating to the efforts of the Commonwealth of Virginia and the State of West Virginia to make an adjustment of the liability of the latter State, if any such liability exists, between the year 1865, when communication between the two States was re-established, and the year 1872, are as follows:

Prior to December, 1866, the Commonwealth of Virginia instituted a suit in equity against the State of West Virginia in this Honorable Court for a decision of the question whether or not the counties of Berkeley and Jefferson constituted a part of the State of West Virginia. This cause was not determined until the 6th day of March, 1871, on which day it was decided in favor of West Virginia. The effect of the pendency of this suit for over four years was to prevent a satisfactory adjustment of West Virginia's liability for the payment of an equitable proportion of the public debt of Virginia as provided in said ordinance of the Wheeling Convention because of the fact that West Virginia's boundaries could not be known and therefore it could not be

determined what amount of money had been expended within her limits for public works or other purposes prior to the 1st day of January, 1861.

Respondent avers that the Governor of West Virginia in his message to the legislature in January, 1866, recommended that Commissioners be appointed to settle with the commonwealth of Virginia respecting the said public debt; but no action was taken by the legislature of West Virginia of 1866 for the reason that the authorities of Virginia had made, at that time, no provision for a settlement, so far as was known to the authorities of West Virginia.

In his message to the legislature of West Virginia in 1867, the Governor again directed the attention of that body to the subject of the adjustment of the said public debt, stating that he was informed that Honorable Alexander H. H. Stuart of Virginia, together with two others, had been appointed under a resolution adopted by the General Assembly of Virginia: First for the purpose of securing a reunion of the two States, or secondly, for the purpose of adjusting the public debt and for a fair division of the public property. On the 28th day of February of the same year, the legislature of West Virginia by resolution declared that the people of that State were unalterably opposed to a reunion with the people of the commonwealth of Virginia, but expressed the willingness of the citizens of West Virginia to effect a prompt and equitable settlement between the States and directed the Governor as soon as the said suit in the Supreme Court of the United States, relating to the counties of Berkeley and Jefferson, had been disposed of, to appoint three commissioners on the part of West Virginia to treat with the commissioners of Virginia upon the matter of adjusting the public debt of that State as provided in the ordinance of 1861, and the Constitution of West Virginia, adopted by the convention which assembled in November, 1861, and also requiring a report of their action to the Governor in order that the same might be communicated to the legislature of West Virginia for its action.

In January, 1868, the Governor of West Virginia informed the legislature in his annual message that the commissioners had not been appointed under the resolution because the suit in relation to the counties of Berkeley and Jefferson had not been disposed of. But in February of that year the Committee on Claims and Grievances of the House of Delegates, upon the petition of one of Virginia's creditors asking that the State of West Virginia provide for

the payment of certain bonds of the State of Virginia of which he claimed to be the bona fide holder, reported that the settlement of West Virginia should be with the State of Virginia and not with the creditors of Virginia. And again in his message of 1869 to the Legislature of West Virginia the governor referred to the subject of the settlement of the public debt of Virginia and stated that commissioners had not been appointed by him up to that time owing to the fact that the suit between the States was still pending. The State of Virginia having, by an act approved February 18, 1870, provided for the appointment of three commissioners to treat with the authorities of the State of West Virginia, the governor of West Virginia, by communication dated February 24, 1870, advised the Legislature of West Virginia of the passage of that act by Virginia, and thereupon the Legislature of West Virginia, on the 1st day of March, 1870, appointed a joint committee of the two Houses of the Legislature to confer with the Virginia Commissioners and report to the Legislature, provided, however, that such appointment of commissioners should not in any manner prejudice the rights of West Virginia involved in the suit in equity brought against her by the commonwealth of Virginia as hereinbefore stated, which was still pending in this court.

Afterwards, on March 3, 1870, the governor of West Virginia was authorized by the Legislature to appoint three resident citizens of the state to treat with the authorities of the Commonwealth of Virginia upon the subject of the proper adjustment of the public debt of that State, but it was provided that nothing in that action was to be construed as impairing the jurisdiction of West Virginia over the counties of Berkeley and Jefferson; but as there was an omission to make an appropriation to pay the expenses of West Virginia's commissioners, and the resolution authorizing their appointment was passed on the last day of the session of the Legislature, the Governor of West Virginia again in his message of 1871 stated that no appointment had been made owing to the lack of funds to pay the expenses of such commission.

Pending the efforts thus being made on the part of West Virginia, the general assembly of Virginia, on February 20, 1871, through the Governor of that State, tendered to West Virginia a proposition for an arbitration of the question relating to the public debt of that State, the arbitrators not to be citizens of either State, each State to appoint two arbitrators and the two to select an umpire if deemed necessary. This proposal made by the Commonwealth

of Virginia was submitted to the Legislature of West Virginia on the 17th day of February, 1871, but on the 15th day of February, 1871, two days prior to the communication of this action of the General Assembly of Virginia, the Legislature of West Virginia had passed a joint resolution authorizing the Governor to appoint three disinterested citizens of the State to treat with the authorities of the Commonwealth of Virginia upon the subject of the adjustment of the public debt of that State existing prior to the 1st day of January, 1861, to report on various matters relating to the creation of the debt; upon the investments held by the State of Virginia, and, providing, among other things, compensation for the commissioners and for the employment of an accountant or clerk.

The proposal of Virginia relating to arbitration was referred by the Legislature of West Virginia to a joint special committee of the two Houses, which committee reported a preamble and joint resolution rejecting the tender of arbitration made by the Governor of Virginia because the adjustment of the debt should be subject to the ratification of the legislatures of the two States and because citizen commissioners from both States would be necessarily more familiar with the circumstances attending the creation of the said debt and other questions connected therewith. The said joint resolution also invited the Commonwealth of Virginia to appoint three disinterested citizens of that State as commissioners, with authority to treat with the commissioners, theretofore authorized upon the part of West Virginia; but it was provided that their report should be subject to the approval and ratification of the legislature of the State of West Virginia and the General Assembly of the Commonwealth of Virginia; and the Governor of West Virginia was also directed by said resolution to communicate to the Governor of Virginia, without delay, certified copies of the preamble and resolution. Accordingly, in pursuance of this resolution, the Governor of West Virginia appointed three commissioners to negotiate with the State of Virginia for a settlement of West Virginia's equitable part of the public debt. After their appointment the said commissioners proceeded to Richmond, where all the accounts, vouchers and other evidences of the receipt and expenditure of the money were kept, and there spent some time in the examination of such documents as were accessible, but realizing the necessity for further and more accurate information than they could obtain unassisted, they addressed a communication to the second auditor of the Commonwealth of Virginia soliciting specifically the necessary information. To

this request on the part of the Commissioners of West Virginia, the said second auditor made a reply in which he declined to furnish the information desired, a copy of which reply is herewith filed as "Exhibit No. 2" and made a part of this answer.

The failure and refusal of Virginia to co-operate with the said commissioners placed them at a great disadvantage in the examination of the records at Richmond, and they therefore obtained only such facts and figures as to enable them to make an imperfect report to the Governor of the State of West Virginia with reference to said public debt, showing the part of said public debt for which, in their opinion, according to such information as they could procure, West Virginia was liable.

Respondent avers that by reason of the inability of said commissioners to procure from the State of Virginia the necessary information concerning the public debt and other matters connected therewith, their report was not only very incomplete and inaccurate, but it appeared therefrom, that in making their investigations they wholly disregarded the provisions of the ordinance of the Wheeling Convention adopted August 20, 1861, and did not follow the method of settlement therein prescribed and respondent avers that for these and other reasons the conclusions of said commissioners were not agreed to or accepted by the Legislature of West Virginia; but subsequently the Senate of West Virginia proceeded to make an investigation of the subject through its Finance Committee, of which J. M. Bennett, who was for eight years auditor of the old State of Virginia, and whose time expired when the city of Richmond was evacuated in 1865, was chairman. Said committee made a report on the 22nd day of December, 1873, from which it appeared that the State of West Virginia upon a settlement with the Commonwealth of Virginia based upon the provisions of section nine of the ordinance passed by the commonwealth of Virginia at the Wheeling Convention, did not owe to the said Commonwealth of Virginia anything whatever, but that, on the contrary, the said Commonwealth was indebted to West Virginia on account of said debt on the 1st day of January, 1861, in the sum of \$512,000, not including interest. A copy of said report is filed herewith, and made a part hereof as Exhibit 3.

The State of West Virginia has never receded from the provisions contained in section nine of the Wheeling Ordinance with reference to the settlement of this respondent's just proportion of the public debt of Virginia, but has uniformly adhered thereto throughout her history as a State; and the resolutions adopted by her Legislature in

recent years in which she declared that she did not owe the State of Virginia anything on account of said public debt were based upon the said report of the Senate Committee made in 1873 as aforesaid, and upon Virginia's persistent refusal to recognize the basis of settlement provided for in said ordinance as the just and true one upon which a settlement between the two States could legally and equitably be made.

After the proposition of the Commonwealth of Virginia to select arbitrators, which was declined by the State of West Virginia as hereinbefore stated the said Commonwealth of Virginia at no time signified her desire to settle with West Virginia the matters relating to West Virginia's proportion of said public debt until the adoption of a joint resolution approved March 6, 1894, after she had compromised and settled with her creditors and been released from all liability, which resolution provided for the appointment of a commission of seven members who were thereby authorized and directed to negotiate with the State of West Virginia for a settlement and adjustment of the latter State's part of the public debt proper to be borne by her, but which also expressly provided that such commission should not proceed with such negotiations until assurances should be received from the holders of a majority in amount of the certificates issued by Virginia under the acts hereinafter referred to, that they desired the said commission to enter into and undertake such negotiations and would accept the amount so ascertained to be paid by the State of West Virginia in full settlement of the one-third of the debt of the original State which had not been assumed by the State of Virginia; and it was also provided in said resolution that in no event should said commission enter into negotiations except upon the basis that Virginia was bound only for the two-thirds of the debt of the original State and which, as recited in said resolution she had already provided for as her equitable proportion thereof. Under the aforesaid resolution no negotiations were proposed to West Virginia until the year 1895 and then only upon the conditions prescribed in the joint resolution of 1894, which has never yet been repealed or modified in this respect; and negotiations were again offered by Virginia in 1906 but upon the same condition, that West Virginia should enter upon such negotiations with the admission on her part that the said Commonwealth of Virginia should only be liable for two-thirds of said debt, which was again declined by the said State of West Virginia.

XII.

This respondent further answering the said bill, says that the efforts looking to a settlement, and the only efforts looking to a settlement, are those hereinbefore stated in paragraph XI in this answer; the said commonwealth of Virginia having declined in 1871 to appoint any commissioners empowered and authorized to adjust or confer with the commissioners appointed by the State of West Virginia to adjust and determine what was the proportion of the public debt of said commonwealth to be assumed by this respondent. But, on the contrary, the said State of Virginia in 1871, assumed the right herself to settle the said public debt, created prior to January 1, 1861, with her creditors and for that purpose, without advising or consulting with West Virginia, passed an act, approved March 30, 1871, whereby she repudiated the ordinance of the Wheeling convention and adopted a method of her own as a basis of settlement and set apart as her own just proportion of said public debt two-thirds thereof, providing for its adjustment and funding as in the said act is set forth; a copy of which is filed with said bill as exhibit No. 1.

XIII

This respondent further answering said bill, says that any burden that the commonwealth of Virginia assumed with reference to the payment of said debts, was made upon the assumption that she owed only two-thirds thereof and which she thereby admitted was not more than her just proportion; and therefore whatever she has paid on account thereof is a matter that cannot affect any controversy involved in this suit and is a matter of which the commonwealth of Virginia cannot complain. It is true, as alleged in said bill, that the great mass of creditors of the commonwealth of Virginia have agreed to accept the certificates issued under the acts of 1871, 1879, 1882 and 1892, for the one-third of her public debt, created prior to January 1, 1861, and have likewise agreed to accept the adjudication of this court whatever it may be, in full discharge of all their claims against Virginia on account of the old bonds and their claims represented by said certificates, thus relieving said commonwealth from any further liability as to said one-third of the public debt, or any part thereof, and this was the effect which the commonwealth of Virginia and the creditors intended and understood that the act of March 30, 1871, should have as to all the certificates issued under that act.

XIV

This respondent for further answer to said bill, and especially that part contained in paragraph XIV, says that the old bonds were all required by the acts of the Legislature to be surrendered by the holders thereof to the State of Virginia and canceled, and they were all surrendered and canceled and new bonds were issued in lieu thereof for two-thirds of the said debt, not including interest, and certificates were issued for the other one-third; and it was declared by Virginia in the acts authorizing the issues and in the certificates that they were to be paid by West Virginia; and respondent avers that the said commonwealth of Virginia now holds said certificates in trust only for the owners thereof.

This respondent denies that Virginia used any means for an amicable settlement of said debt with West Virginia, or made any overtures to that end which were repeatedly refused, as alleged in said bill, except as hereinbefore stated in paragraph XI of this answer.

XV.

This respondent, for further answer to said bill, avers that even if all the bonds and obligations and other evidences of indebtedness of the original State of Virginia outstanding or contracted before January 1, 1861, as stated in paragraph I of said bill, except a comparatively insignificant sum, not amounting to one percentum of this liability, have been taken up and are now actually held by the commonwealth of Virginia, this fact does not give to the plaintiff the right to call upon West Virginia for settlement with respect thereto, because this respondent avers that the said bonds and obligations and other evidences of public indebtedness of the commonwealth of Virginia, contracted prior to January, 1861, have been taken up by the issuance of other bonds in lieu of two-thirds thereof as before stated, and by the issuance of the certificates hereinbefore mentioned for the other one-third thereof, the said one-third to be paid by West Virginia, according to the plan of funding the said debt by said commonwealth of Virginia, and that all the said original bonds and obligations and other evidences of said indebtedness are without any force, effect or value and have been canceled and annulled as aforesaid. Respondent avers that whatever has been paid upon said old indebtedness, by Virginia, if anything, was paid only on account of her own separate and equitable proportion thereof as recognized and declared by herself; and this respondent denies that

the commonwealth of Virginia has any claim either in law or equity for any accounting with reference to said bonds or certificates or other evidences of indebtedness mentioned in paragraph XV of said bill or any part thereof. Respondent avers that the plaintiff does not allege or admit in said bill, nor does it appear thereby, that she is liable on account of the other one-third or for any part thereof, which is represented, as before alleged, by said certificates.

XVI.

For further answer to said bill respondent avers that if any sum has been paid by Virginia, even though amounting in the aggregate to \$25,000,000, including principal and interest to date, calculated at the rate of 6 per centum per annum, it was paid by her on account of her admitted just and equitable proportion of said public debt created prior to January 1, 1861; and if she has any claim at all against West Virginia on account of said alleged payment, which is not admitted, but is denied, it can only be for such amount as may be ascertained upon the basis and according to the principles embodied in section 9 of the ordinance of the Virginia convention, as hereinbefore stated. So this respondent denies that she is liable for any part of the obligations mentioned in paragraph XV and paragraph XVI of the plaintiff's bill, alleged to have been taken up and paid on account of said public debt, and denies that the said commonwealth of Virginia has, in her own right, a "just claim" against West Virginia for contribution on account thereof.

Respondent, for further answer to said paragraph XVI of said bill, avers that all accounts, vouchers and other records relating to the said public debt of Virginia, showing the payments made thereon, if any, and all other facts connected therewith, are now and always have been in the exclusive possession and control of the plaintiff, and respondent has no knowledge or information concerning the alleged payment of \$25,000,000, or any other sum, on account of said debt existing prior to January 1, 1861, and therefore denies that plaintiff has paid said sum of \$25,000,000 or any part thereof, and demands strict proof.

XVII.

This respondent, for answer to paragraph XVII of said bill, avers that the matters therein contained do not relate to the public debt of Virginia within the meaning and contemplation of section 9 of the Virginia ordinance of August 20, 1861, and cannot be brought

into this suit for adjudication and determination. This respondent denies any and all liability for or on account of the matters referred to in said paragraph and avers that the said allegations are so uncertain, general and indefinite that respondent cannot answer them specifically and that no claim against this respondent can be founded upon them in this action.

XVIII.

This respondent, for further answer to said bill says that she denies that the alleged liability of the State of West Virginia for a just and equitable proportion of the public debt of the commonwealth of Virginia rests upon any of the grounds specified in paragraph XVIII of said bill except the second, upon which, as hereinbefore averred in this answer, the State of West Virginia has always been ready and willing, and is now ready and willing, to adjust her liability, and upon which she proposed adjustment from 1866 to 1873, at which time Virginia had clearly evinced by her legislative action with reference to her public debt, her intention not to observe or abide by section 9 of the ordinance adopted by the Wheeling convention, and actually repudiated the agreed method upon which a settlement between the States should be made.

XIX.

This respondent, for further answer to said bill, avers that the only acts of Virginia indicating a desire to treat with West Virginia with reference to said public debt was that in which she tendered a proposition to arbitrate the same, thereby proposing to ignore the mode of settlement provided in said ordinance, and the two subsequent ones whereby she declared the only conditions upon which she would negotiate with the said State of West Virginia was that West Virginia should admit that the said Commonwealth of Virginia was only liable for two-thirds of the said public debt; and this respondent avers that if it is intended by paragraph XIX of said bill to aver that plaintiff ever attempted an amicable negotiation with West Virginia, except the ones hereinbefore stated, then this respondent denies the allegations contained in said paragraph of the bill and calls for proof thereof.

XX.

This respondent, for further answer to said bill, avers that what has already been stated in paragraph XIX of this answer is also applicable to paragraph XX of said bill and is hereby

adopted as part hereof; and respondent avers in addition thereto that the alleged attempts of said commission to negotiate with West Virginia with reference to the said public debt related solely to the certificates owned by third parties and held in trust by said commission and the state of Virginia, which certificates represented about all, or practically all, of the one-third of the public debt not including interest of that State created prior to January, 1, 1861; and these efforts on the part of said commission to negotiate were upon the expressed condition that this respondent should concede that the Commonwealth of Virginia was, and is, liable for two thirds of the said public debt, and no more, which proffered negotiations were declined by the State of West Virginia because the finance committee of one branch of her legislative body had ascertained and reported that there was no liability upon her part to the Commonwealth of Virginia on account of the said public debt under the ordinance of the Wheeling Convention, and this respondent now denies that she owes or will owe any sum whatever to the State of Virginia upon a settlement made in the mode provided in said ordinance.

For further answer respondent says that the ordinance adopted by the Wheeling Convention in August, 1861, provided for the formation of the new State out of a part of the territory of the Commonwealth of Virginia, defined in the manner in which the respondent's equitable proportion of the public debt of Virginia should be ascertained, as appears from section nine of the said ordinance, which is set out in paragraph VI of the plaintiff's bill, and is heretofore referred to and made part of this answer..

And the said Commonwealth of Virginia also provided by section 10 of said ordinance as follows:

“When the General Assembly shall give its consent to the formation of such new state, it shall forward to the Congress of the United States such consent, together with an official copy of such Constitution, with the request that the said new state may be admitted into the Union of States.”

And respondent avers that the General Assembly referred to in section ten was the General Assembly of the Commonwealth of Virginia and the constitution referred to in said section was the constitution to be thereafter adopted by the proposed new state.

The said ordinance as heretofore stated also provided for the holding of a convention by the citizens within the territory of the proposed new state for the purpose of framing a constitution. Af-

ter the promulgation of the ordinance of the convention, the people of Virginia, as well as those residing in that part of the territory to be converted into a new state as those residing in the other part of the Commonwealth of Virginia, which constitutes the present territory of that State, were fully advised as to the provisions of the said ordinance defining the manner in which the equitable proportion of the said debt was to be ascertained, and when the Constitution of West Virginia was framed and adopted in the year 1861 the said section nine was in full force, and both the Commonwealth of Virginia and the citizens residing in that portion thereof out of which the proposed new state was to be formed were satisfied with the methods therein provided for ascertaining this respondent's equitable proportion of the said public debt, and the constitution was framed and adopted, and West Virginia's equitable proportion of said public debt was assumed on the basis of the said ordinance, and not otherwise. It was provided in section eight, Article VIII, of the Constitution of the State of West Virginia:

“An equitable portion of the public debt of the Commonwealth of Virginia prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years.”

After the adoption of this Constitution the Commonwealth of Virginia, on May 13, 1862, as hereinbefore stated, by an act of her Legislature, gave her consent to the formation of the new state. “According to the boundaries and under the provisions set forth in the Constitution for the said state of West Virginia, and the schedule thereto annexed, proposed by the Convention which assembled at Wheeling on the 26th day of November, 1861.”

Subsequently, by an act of Congress approved December 31, 1862, provision was made for the admission of West Virginia into the Union, the said act providing a change in the seventh section of the eleventh article of the constitution of the said new state, relating to slavery, and providing for a vote to be taken relative thereto, and the proclamation thereof by the President of the United States, under which West Virginia, on the 20th day of June, 1863, became one of the states of the Union.

And so this respondent is advised, and now avers, that when West Virginia framed her constitution and inserted in it the provision concerning the adjustment of the public debt of Virginia and the Commonwealth of Virginia, through her Legislature, by the act aforesaid, approved the constitution of West Virginia as the basis of her consent for the formation of that State and her admission into the Union, and upon the passage of the act Congress admitting the said state into the Union, a compact between the two states prescribing the manner in which this respondent's equitable proportion of the debt should be ascertained was concluded and it became, and is binding upon the Commonwealth of Virginia and the State of West Virginia.

The respondent avers that her equitable proportion of said debt cannot be otherwise ascertained or determined than by the action of the State of West Virginia through her Legislature, as provided by her constitution, nor can its liquidation be otherwise provided for than by a sinking fund of sufficient amount to pay the accrued interest and redeem the principal of whatever sum may be thus ascertained within the period of thirty-four years as likewise therein provided. Respondent therefore pleads and relies upon said compact in bar of the plaintiff's right to prosecute and maintain this suit in this Honorable Court and prays that the said bill may be dismissed.

XXII.

This respondent further answering and as a defense to said bill avers that the Commonwealth of Virginia, by her said bill and exhibits therewith filed and made part thereof, shows that she has adjusted before the institution of this suit to the entire satisfaction of her people and her creditors her alleged equitable proportion of her whole public debt existing on the first day of January, 1861, which she claims is only two-thirds thereof, and that therefore this respondent should be made liable for the other one-third thereof. In effecting this adjustment she refunded all the evidences of indebtedness created prior to January 1, 1861, except about one per centum thereof, and required the same to be surrendered to her and cancelled and annulled. Respondent avers that the said Commonwealth of Virginia did not refund two-thirds of her public debt, as alleged, in said bill although she proposed to do this by an act of her Assembly approved March 30, 1871; but finding that she could probably secure more favorable terms of set-

tlement of what she decided to be her just portion, another act was passed by her General Assembly which was approved March 28, 1879, whereby the debt was divided into two classes as shown by said act and thereby made a further reduction in the principal of her indebtedness, as well as securing a lower rate of interest to be paid thereon.

After various efforts to adjust the indebtedness on terms most favorable to herself, she secured a settlement whereby she funded and settled what she claimed to be her equitable proportion of her debt at a fraction less than forty-seven per cent upon the entire amount, including interest, a part of which she may have paid, but for the great volume of which she has issued her bonds, and which are now outstanding and unpaid. For one-third of her original indebtedness, created prior to January 1, 1861, she has issued certificates amounting in the aggregate to \$18,227,153.60, of which it is alleged her Commissioners of The Sinking Fund and the Literary Fund hold \$2,745,462.60, leaving \$15,281,970 in the hands of the public.

Said certificates were issued by the State of Virginia and accepted by her creditors under the following acts of the General Assembly of that State, to-wit:

Under the act of March 30, 1871, certificates were issued for the sum of \$15,281,970, of which it is alleged the Commissioners of the Sinking Fund and the Literary Fund held \$2,578,515, leaving \$12,703,451 in the hands of the public. Of these certificates issued to the public \$10,851,294 had been deposited with the Virginia Commission on the fourth day of January 1906, and only \$1,852,157 had not been deposited at that time.

Under the act of March 28, 1879, certificates were issued to the amount of \$564,258, of which \$463,892 had been deposited with said commission at the date aforesaid, leaving \$100,366 which had not been deposited. Neither the Commissioners of the Sinking Fund nor the Literary Fund held any of these certificates. The act of the Legislature under which all these certificates were issued and accepted by the creditors expressly provided that they should be taken "as a full and absolute release of the State of Virginia from all liability on account of said certificates."

Under the act of February 14, 1882 certificates were issued to the amount of \$1,775,603 of which \$166,943 were issued to the Virginia Literary Fund and \$1,608,660 were issued to the public. Of the amount issued to the public \$1,313,792 had been deposited

with the Virginia Commission on the date aforesaid, leaving outstanding at that time \$294,868.

Under the act of February 20, 1892 certificates were issued to the amount of \$605,320, of which \$544,456 had been deposited on the date aforesaid, leaving \$60,844 still in the hands of the old bond-holders or their successors in interest. Neither the Commissioners of the Sinking Fund nor the Literary Fund received any of the certificates issued under said act.

The certificates for \$1,774,603 issued under the act of 1882 and the \$605,320 issued under the act of 1892 were in the following form, and the respondent avers that the State of Virginia has been wholly released from liability thereon.

No..... The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be), bond for dollars, dated day of, from....., to be accounted for to the holder of this certificate by the State of West Virginia, without recourse upon this commonwealth.

Done at the Capitol of the State of Virginia, this day of, eighteen hundred and ninety-two.

..... *Second Auditor.*

..... *Treasurer.*

And respondent says that the amount of certificates of all classes deposited with the Virginia Commission on the date aforesaid was \$13,173,435.41, but respondent does not know what amount, if any, has been deposited since that time, and respondent asks that the State of Virginia be required to show on the hearing of this cause, what amount of certificates have been so deposited since January 4, 1906, and under what acts of the Legislature the same were issued. Respondent avers that all said deposits were made under and in accordance with the agreement made between the Virginia Commission and the Depositing Committee for the certificate holders on the 24th day of November, 1895, which, among other things provides as follows:

“And the said depositing committee agrees on behalf of the depositors of said deferred certificates so placed subject to the control of the said commission and on behalf of those entitled to the benefit of said certificates as assignees of said depositors or otherwise to accept as aforesaid such amount, either in cash or securities, as may be determined or ascertained in any such suit to be due by, or as may be

realized through any adjustment or settlement as aforesaid from the State of West Virginia on account of the said certificates and on account of the bonds represented by and mentioned in the said certificates respectively, in full settlement and satisfaction of all claims on account of said certificates and on account of the bonds therein mentioned, and to accept and take such adjudication against the State of West Virginia in full discharge and acquittance of all claims in the premises against the State of Virginia."

And so respondent avers that the Commonwealth of Virginia has been wholly released from all liability on account of the said certificates and every part of them and has no legal or equitable interest in any claim based thereon, and that this suit was instituted and is being prosecuted by the said Commonwealth of Virginia solely as trustee for and on behalf of the holders of said certificates and not in her own right; and that she has agreed through her said commission with the said creditors that she is to incur no expense on account of this action and that the whole expense thereof is to be borne by the holders of said certificates in whose behalf and for whose exclusive benefit the same was instituted and is now being prosecuted.

XXIII.

This respondent for further answer to said bill says that all the matters and allegations therein contained and not admitted in this answer to be true or heretofore specifically denied, are now and hereby denied and strict proof thereof is required.

Wherefore, this defendant, having fully answered, confessed, traversed and avoided or denied all the matters in the said bill of plaintiff, material to be answered, according to her best knowledge and belief and humbly prays this Honorable Court that the said plaintiff's bill be dismissed and that this defendant have and recover her reasonable costs.

And as in duty bound she will ever pray, etc.

CLARKE W. MAY,

Attorney General,

J. G. CARLISLE,

CHAS. E. HOGG,

W. MOLLOHAN,

GEO. W. MCCLINTIC,

W. G. MATHEWS,

For West Virginia.

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, SS:

This day there personally appeared before me, the undersigned authority in and for said County and State, William M. O. Dawson, Governor of the State of West Virginia, the defendant named in the foregoing cause, and being by me duly sworn, says that he is the Governor of the defendant, the said State of West Virginia, and that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein contained and alleged are true as therein alleged and stated to the best of his information and belief.

WM. M. O. DAWSON,
Governor of West Virginia.

Sworn to and subscribed before me this 5th day of October,
A. D., 1907.

W. B. MATHEWS,
Clerk Supreme Court of Appeals.

EXHIBITS WITH ANSWER.

In the Supreme Court of the United States.

Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

EXHIBIT NUMBER 1.

An Act giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State.

Passed May 13, 1862.

1. Be it enacted by the General Assembly, That the consent of the Legislature of Virginia be, and the same is hereby given to the formation and erection of the State of West Virginia, within the jurisdiction of this State, to include the counties of Hancock, Brooke, Ohio, Marshall, Wetzel, Mason, Monongalia, Preston, Taylor, Tyler, Pleasants, Ritchie, Doddridge, Harrison, Wood, Jackson, Wirt, Roane, Calhoun, Gilmer, Barbour, Tucker, Lewis, Braxton, Upshur, Randolph, Mason, Putnam, Kanawha, Clay, Nicholas, Cabell Wayne, Boone, Logan, Wyoming, Mereer, McDow-

ell, Webster, Pocahontas, Fayette, Raleigh, Greenbrier, Monroe, Pendleton, Hardy, Hampshire and Morgan, according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia and the schedule thereto annexed, proposed by the convention which assembled at Wheeling, on the twenty-sixth day of November, eighteen hundred and sixty-one.

2. Be it further enacted, That the consent of the legislature of Virginia be, and the same is hereby given, that the counties of Berkeley, Jefferson and Frederick, shall be included in and form part of the State of West Virginia whenever the voters of said counties shall ratify and assent to the said constitution, at an election held for the purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe.

3. Be it further enacted, That this act shall be transmitted by the executive to the senators and representatives of this commonwealth in congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of congress to the admission of the State of West Virginia into the union.

4. This act shall be in force from and after its passage.

EXHIBIT NUMBER 2.

SECOND AUDITOR'S OFFICE, }
RICHMOND, NOV. 16, 1871. }

A. W. Campbell, Esq., Secretary, &c.:

DEAR SIR:—Yours of the 14th was received. You ask me for a report upon a variety of questions connected with our public debt, the transactions of the Board of Public Works in regard to it, and the financial affairs of the State, which it is understood, of course, you propose to use in the contemplated adjustment of the portion to be paid by West Virginia of the debt.

To answer the questions propounded would involve an amount of labor which we could not bestow on the subject.

But, apart from this, I presume at an early day this office will be called upon by the Executive or the General Assembly of Virginia for detailed reports of all the matters referred to, which will be available to you.

The books and records of this office are open to your inspection.

I trust that in failing to respond to your inquiries you will not regard me as in any wise wanting in official courtesy to you or your associates. None, certainly, is intended.

I have the honor to be,

Most respectfully yours,

ASA ROGERS.

EXHIBIT NUMBER 3.

REPORT OF THE SENATE FINANCE COMMITTEE OF 1873.

STATE OF WEST VIRGINIA, }
CHARLESTON, December 22, 1873. }

The attention of the Committee on Finance has been repeatedly called by resolutions introduced in the Senate and otherwise, to the subject of Virginia's public debt and the share which it is equitable for West Virginia to bear and pay. The committee under these frequent promptings have been constrained to give the subjects their most earnest and careful attention as a matter fraught with more than ordinary consequence to the State, and have come to a conclusion satisfactory to themselves, and it is believed that the conclusion of the committee will be approved by the judgment of the people interested, and will receive the sanction of any tribunal before whom it may be brought for adjudication.

It is necessary to a full understanding of this subject that reference be had to the treaty stipulations or fundamental conditions, by whatsoever name they may be called, between the representatives of the people of Virginia and the people desiring separation, by the creation of a new State, which led to the formation of a constitution, its adoption by the people and its approval by Congress, and the establishment of the State of West Virginia.

The ninth section of "an ordinance to provide for the formation of a new State out of a portion of the territory of this State," [Virginia] passed August 20, 1861, provided, that "the new State shall take upon itself a just proportion of the public debt of the commonwealth of Virginia *prior to the first day of January, 1861*, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of the debt was contracted; and deducting therefrom the monies paid into the treasury of the commonwealth from the counties included within the said new State during the same period."

Upon compliance with the conditions contained in the ninth section and here quoted the people within the counties now constituting West Virginia, were authorized to form a constitution to be presented to Congress for its approval and for the admission of the new State into the Union.

Accordingly a constitution was adopted by a convention of the people from the several counties now constituting the State of West Virginia and to carefully guard and secure the rights prescribed by Virginia as a condition precedent to the formation of the new State, a provision was incorporated into it to secure the exact fulfillment of the treaty stipulations as aforesaid.

By article eight, section eight of the constitution, it was provided that "an equitable proportion of the public debt of the Common-

wealth of Virginia prior to the first day of January, 1861, shall be assumed by this State and that the Legislature shall ascertain the same as soon as may be practicable, and to provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This subject has received a careful consideration by commissioners appointed by authority of this State, and while this committee see much to approve in the Report of the Debt Commissioners of West Virginia on this subject for their great research and the ability with which they handled the subject, considering the peculiar difficulties under which they labored, as shown in their report, and in the illustration of the many problems that may rise in the discussion of this subject, yet this committee think the controlling question has not been discussed by the Commissioners by reason of the embarrassment surrounding their action; and the Committee beg leave to refer to the report which is appended hereto and marked No. 1.

In construing the legal principles involved in this matter, it may be assumed that a private creditor of Virginia cannot sue West Virginia for contribution; for that is prohibited by the Constitution of the United States; see article eleven of amendments United States Constitution which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens or subjects of any foreign State." But notwithstanding this prohibition the third article extends the judicial power of the Supreme Court to controversies between two or more States. Under this provision of the Constitution it is within the power of Virginia to institute and prosecute any suit against West Virginia touching the controversies respecting the public debt.

If the conditions precedent to our admission as a State, prescribed by Virginia herself, be accepted as a true basis of adjustment and final settlement, Virginia's claims for expenditures can very properly be offset by our contributions.

Upon this basis the whole subject is one of easy solution, containing no other items than that of creditor or debtor with balances to be struck upon agreed principles. The legislative history of Virginia establishes beyond a doubt that the first act of assembly to create a debt or issue a bond was passed in the year 1821, and the executive records show that the first bond issued by the commonwealth of Virginia was in the year 1822.

From this latter period we date the commencement of our liability under the fundamental stipulations prescribed by Virginia for our separation, which were accepted by the people of this State, approved by Congress, and the President of the United States, as the head of the executive department, and subsequently affirmed by the Supreme Court of the United States, and may at this day be accepted by the public as firmly engrafted into obli-

gations and rights as if the same were constitutional provisions emanating from the supreme power.

The concurrent approval, binding alike upon the people of Virginia and West Virginia, lead us to the following conclusions which are the results of a mathematical demonstration, founded upon public official records, appropriate to determine how much of the bonded debt of Virginia existing prior to January, 1861, was expended within the limits of this State, and how much was contributed by the counties forming the same.

The report of the Debt Commissioners hereinbefore referred to shows that all State expenditures within this State prior to January, 1861, amounted to \$3,366,929.29, and although it is apparent that bonds for quite a large amount of this sum were never issued, nevertheless the expenditures would seem to import an obligation upon our people to return every dollar which has been so contributed to the development of the territory of our State.

The committee have not entered into the tedious process of calculating the interest, for the obvious reason that there would be as much interest on our contributions to as upon the receipts of Virginia.

The committee have therefore assumed the foregoing sum of \$3,366,929.29 as importing a debt upon West Virginia to be gathered and itemized from the report of the Debt Commissioners aforesaid.

From the amount of the foregoing expenditures must be deducted the moneys paid into the Treasury of the Commonwealth of Virginia, from the counties included in this State during the same period. For the sake of convenience the committee have charged to Virginia, not the whole contribution, but the surplus after deducting a just proportion of the ordinary expenses of the State government. Our total contributions from taxes to the State of Virginia in the year 1822, amounted to \$63,000; and in that year the total of the expenses of the State government chargeable to us was \$47,000, leaving an excess of \$16,000, which would go to the liquidation of the debt created for expenditures within our midst.

This small surplus in 1822, by the process of an increased rate of taxation, and the increased value of the subjects to be taxed, the rate rising from 8 cents to 40 cents on every one hundred dollars in value, made the excess of our contributions to the treasury of Virginia in the year 1860 amount to \$512,000, rejecting fractions.

Thus our contributions to the treasury of Virginia arising from taxes collected in that year amounted to \$647,079.96. In the same year our proportion of the ordinary expenses of government amounted to \$135,000, which left the surplus aforesaid of \$512,079.96. It will be observed that the committee have referred only to the surplus in 1822 and in 1860. The surplus for the

intermediate periods swell the aggregate of our contributions to \$3,892,000 which is in excess of expenditures within our limits by \$525,000.

It will thus be seen that our state is not indebted and the Committee confidently advance this statement, not only as containing the true basis of settlement between the two States, but it is supported by incontrovertible facts, by conditions precedent prescribed by Virginia under the restored government which government has been approved as aforesaid by Congress, by the Executive and by the Supreme Court of the United States.

Notwithstanding the satisfactory condition of our finances and our material resources, the attention of the committee has been called to the fact that "West Virginia certificates" and "West Virginia bonds" are quoted at the marketable value of from five to fifteen cents on the dollar, in money of the stock exchanges and markets of the United States. This of course has a tendency to depreciate the just credit to which a State is entitled. For it is acknowledged that the credit of a State depends upon the value of its taxable property, the amount of its indebtedness and above all upon its punctuality in meeting its engagements. These quotations imply two things: first, that we owe a debt; second, that we are either unable or unwilling to pay the debt which beget a want of confidence in the minds of the public who are uninformed with respect to the true condition of West Virginia; and operate unjustly and injuriously upon us. It would seem to be enough for us to say, and we make the assertion without the fear of contradiction, that we owe no debt, that we have issued no bonds and our Constitution forbids the creation of a liability in the nature of a public debt; and with this assurance we cannot demand more nor expect less of all honorable stock brokers and bankers than the withdrawal from the list of indebted states the name of West Virginia.

"West Virginia certificates" and "West Virginia bonds" do not exist. No bonds have ever at any time been issued by West Virginia and we have prohibited from issuing at any time hereafter any bonds on the faith of this State. The bonds or certificates referred to were issued by Virginia, and West Virginia had no agency or participation therein.

In respect to the credit which our conduct and property would imply, we might be indifferent, but we have higher aims and more ennobling ambition. We desire to invite immigration, to cultivate our forests and to develop our mineral resources; this cannot be done with success, when men of thrift and capital are deterred from immigrating to and within our borders by reason of the persistent and unjustifiable misquotations of our credit. No one could be expected to invest capital within a State which has so absorbed the substance of the people thereof that its good faith and obligations were only worth five cents on the dol-

lar. West Virginia owes no debt, has no bonds for sale and asks no credit.

J. M. BENNETT,
Chairman.

JOHN W. GRANTHAM,
A. E. SUMMERS,
J. T. MCCLASKEY,
R. B. SHERRARD,
ELLIOTT VAWTER.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Decree Proposed by Virginia Referring the Cause to
a Master.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA, *Complainant,*

vs. In Epuity.

STATE OF WEST VIRGINIA, *Defendant.*

Original No. 4..

DECREE PROPOSED BY VIRGINIA REFERRING THE CAUSE TO A
MASTER.

This cause coming on this day to be heard upon the complainant's Bill and the Exhibits filed therewith, the Answer of the defendant, with the Exhibits filed therewith, and the General Replication filed by the complainant thereto, was argued by counsel. On consideration whereof, it is adjudged, ordered and decreed that this cause be referred to———, who is hereby appointed a Special Master herein, who, after giving ten days' notice to the parties of the times and places fixed by him, from time to time, for executing this decree, will, without delay ascertain and report to the Court:

I.

The amount of the public debt of the Commonwealth of Virginia as of the first day of January, 1861, stated specifically, how and in what form the same was evidenced, by what authority of

law and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness.

II.

What proportion and amount of said indebtedness and of the interest since accrued thereon, should, in equity, be apportioned to, and be now paid by, the State of West Virginia.

III.

He will make and return with his report any special or alternative statements of the accounts between the complainant and the defendant in the premises, which either may desire him to state, or which he may deem to be desirable to present to the Court.

It is further adjudged, ordered and decreed as follows:

(1) To the end that full and complete information may be afforded the Master as to all matters involved in the inquiries with which he is charged by this decree, the Commonwealth of Virginia, and the State of West Virginia shall each of them respectively produce before the Master, all such records, books, papers, and public documents as may be in their possession, or under their control, and which may, in his judgement, be pertinent to the said inquiries, and accounts, or any of them.

And the Master is authorized to visit the capitals of Virginia and West Virginia and to make or cause to be made such examination, as he may deem desirable, of the books of account, documents and public records of either state relating to the inquiries he is directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All published records published by authority of the Commonwealth of Virginia prior to the formation of the State of West Virginia, and all papers and documents, and other matter constituting parts of the public files and records of Virginia prior to the partition of new territory, which in the judgment of the Master, may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence, and considered by the Master. The public acts and records of the two states since the formation of West Virginia shall be evidenced if pertinent and duly authenticated; but all such testimony tendered by either party shall be subject to proper legal exception as to its competency.

The Master is empowered to summon any persons whose testi-

mony he, or either party, may deem to be material, and to cause their depositions to be taken before him or by a Notary Public, or other officer authorized to take the same, after reasonable notice to the adverse party.

(2) The Master is authorized and empowered to employ such accountants, stenographers, or other clerical assistance as he may find it desirable to employ in order to the prompt and efficient execution of this order of reference, and to agree with such accountants and stenographers and typewriters for such compensation to be made to them as the Master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

(3) The complainant will cause the sum of three thousand dollars to be deposited with the Marshal of this Court to the credit of this cause, on account of the costs and expenses of executing this decree, and of this suit; and in the event that the defendant shall desire any special statements or accounts to be made, she shall in like manner before the taking of any such account, or the making of such special statement, cause the sum of \$——— dollars to be deposited with the Marshal.

And the Master is authorized from time to time to draw upon the fund so deposited by Virginia, for the compensation of the accountants and other clerical assistants whom he may employ, and for any other costs or expenses, including stationery, and printing, which it may in his judgment be necessary to be incurred in executing this order of reference, or making up any special statement or accounts asked for by the plaintiff; and he will draw upon the fund deposited by the defendant for any costs which may be incurred in making up any special statement or accounts which may be desired by the defendant to be specially stated, which drafts, accompanied by proper vouchers, the Marshal of this Court will pay.

And the said Marshal is allowed to have and retain a commission of five per centum for his services in receiving and disbursing the funds so deposited with him, and he will make a report of his transactions, receipts and disbursements in the premises to the Court.

Any notices to be given in connection with the execution of this decree may be given to the Attorneys General of the respective States.

Washington, D. C., Dec. 2, 1907.

To HON. CLARKE W. MAY,

Attorney General of West Virginia.

Please take notice that on the meeting of the Court on Monday next the 9th instant, we will move the Supreme Court of the United States to enter the decree of which the above is a copy in the above entitled cause.

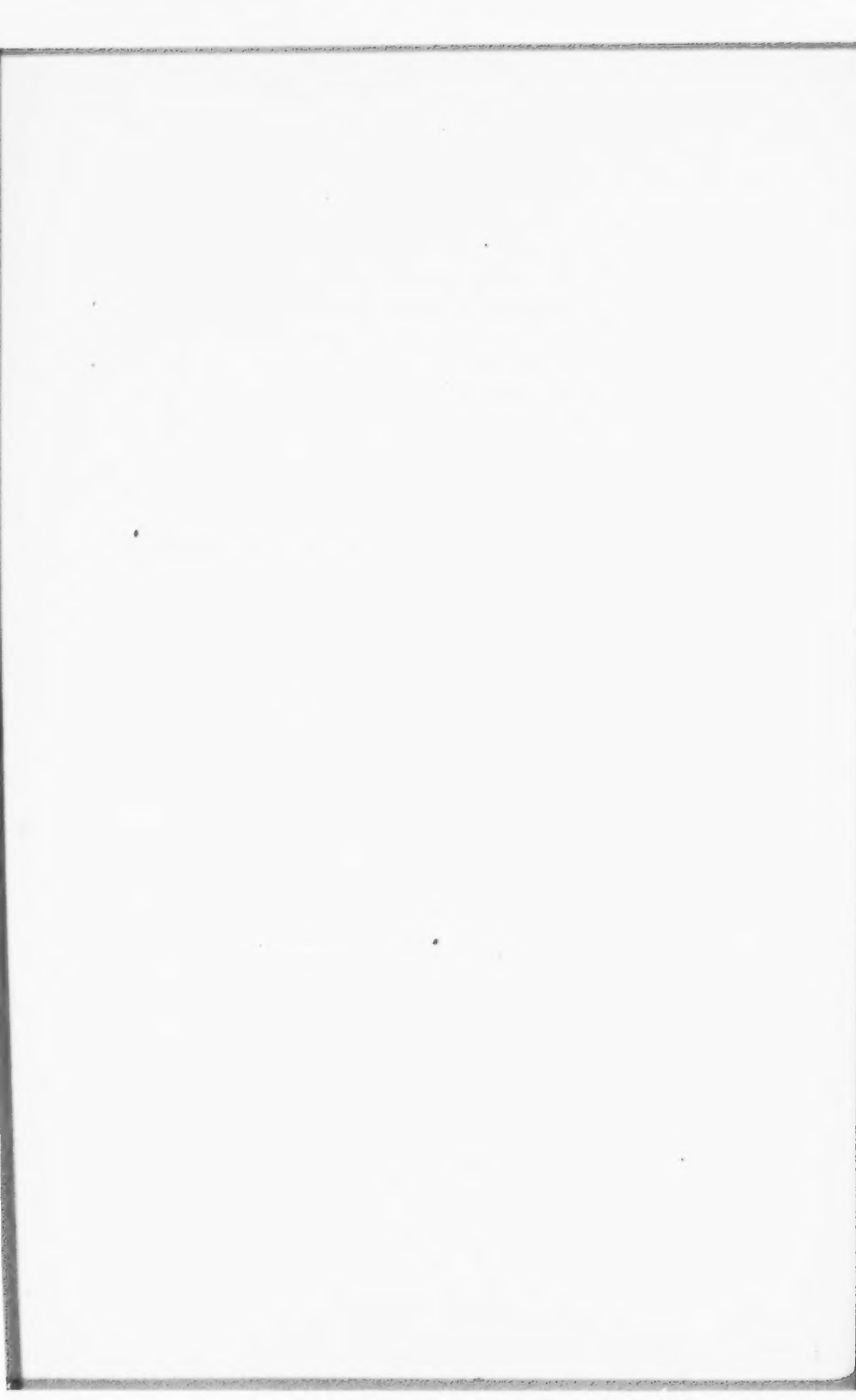
WILLIAM A. ANDERSON,
HOLMES CONRAD,
Counsel for the Complainant.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Decree Proposed by West Virginia Referring the Cause
to a Master.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

IN EQUITY.

Original, No. 4.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

DECREE PROPOSED BY WEST VIRGINIA REFERRING THE CAUSE TO A
MASTER.

This cause came on this day to be heard upon the complainant's bill and the exhibits filed therewith; the answer of the defendant, with the exhibits filed therewith; the general replication thereto by the complainant, and was argued by counsel, and on consideration of which it is adjudged, ordered, and decreed that this cause be, and the same is hereby, referred to _____, who is appointed a special master herein, who, after giving _____ days' notice to the parties of the times and places fixed by him, from time to time, for executing this decree, will ascertain and report to the court:

I.

The amount of the public debt of the Commonwealth of Vir-

ginia on the 1st day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness.

II.

The amount of state expenditures made by the Commonwealth of Virginia prior to the 1st day of January, 1861, within the territory now included within the State of West Virginia since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia at Wheeling, August 20, 1861, charging the same to the State of West Virginia; also a just proportion of the ordinary expenses of the state government of the Commonwealth of Virginia during the same period from the counties included in the State of West Virginia, charging the same to the State of West Virginia, but deducting therefrom the moneys paid into the treasury of the Commonwealth of Virginia during the same period from the counties included within the limits of West Virginia.

III.

Whether any agreements, contracts, or arrangements, other than those appearing from the exhibits filed with the bill herein, have been made by the Commonwealth of Virginia with her creditors since January 1, 1861, with reference to said public debt created prior to said date, or to the satisfaction or discharge of said indebtedness or any part thereof.

IV.

The amount of certificates relating to said indebtedness issued by the Commonwealth of Virginia under the acts of her General Assembly, approved March 30, 1871, March 28, 1879, February 14, 1882, and February 20, 1892; and what amount, if any, of said certificates have been deposited since January 4, 1906, with the commission appointed under the joint resolution of the General Assembly of the Commonwealth of Virginia approved March 6, 1894; and he will also ascertain and report what amount of said certificates so deposited since said date were issued under the act of March 30, 1871; what amount were issued under the act of March 28, 1879; what amount were issued under the act of February 14, 1882, and what amount were issued under the act of February 20, 1892.

V.

The master will ascertain and report to what extent said certificates issued by the Commonwealth of Virginia represented the principal of one-third of said public debt and to what extent they represented the interest thereon, and the rate at which the interest was reckoned; and he will also ascertain and report whether there is included in said certificates, or in any of them, the interest or any part of the interest, which had accrued on the portion of said public debt refunded by the Commonwealth of Virginia, and if so, what was the total amount of such interest and at what rate it was reckoned.

VI.

It is further ordered and decreed that the master shall ascertain and report what amount, if any, of the bonds or other evidences of debt issued by the Commonwealth of Virginia under the act of March 30, 1871, was subsequently surrendered by the holders thereof and exchanged for other bonds or evidences of debt issued under the acts of 1879, 1882, and 1892, and if such exchanges were made, the master will ascertain and report what rate of interest was agreed to be paid upon such new bonds or evidences of debt.

VII.

It is further ordered and decreed that the Commonwealth of Virginia and the State of West Virginia shall each produce before the master all such records, books, papers, and public documents as may be in their possession or under their control, and which may, in his judgment, be pertinent to the said inquiries and accounts or any of them.

And the master is authorized to make or cause to be made such examination as he may deem desirable of the books of account, vouchers, documents, and public records of either state relating to the inquiries he is herein directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All public records published by authority of the Commonwealth of Virginia prior to the 17th day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid which in the judgment of the master may be relevant and pertinent to

any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two states since the admission of West Virginia into the Union shall be evidence, if pertinent and duly authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him, or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

The master is authorized and empowered to employ such stenographers and other clerical assistants as he may find it desirable to employ in order to the prompt and efficient execution of this order of reference, and to agree with such stenographers and typewriters and clerical assistants upon such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

The complainant shall cause the sum of three thousand dollars to be deposited with the marshal of this court to the credit of this cause, and such further sums as from time to time may be required, on account of the costs and expenses of executing this decree; and the master is authorized from time to time to draw upon the fund so deposited by Virginia for the compensation of the stenographers, typewriters, and other clerical assistants whom he may employ, and for any other costs and expenses, including stationery and printing, which may in his judgment be necessary to be incurred in executing this order of reference.

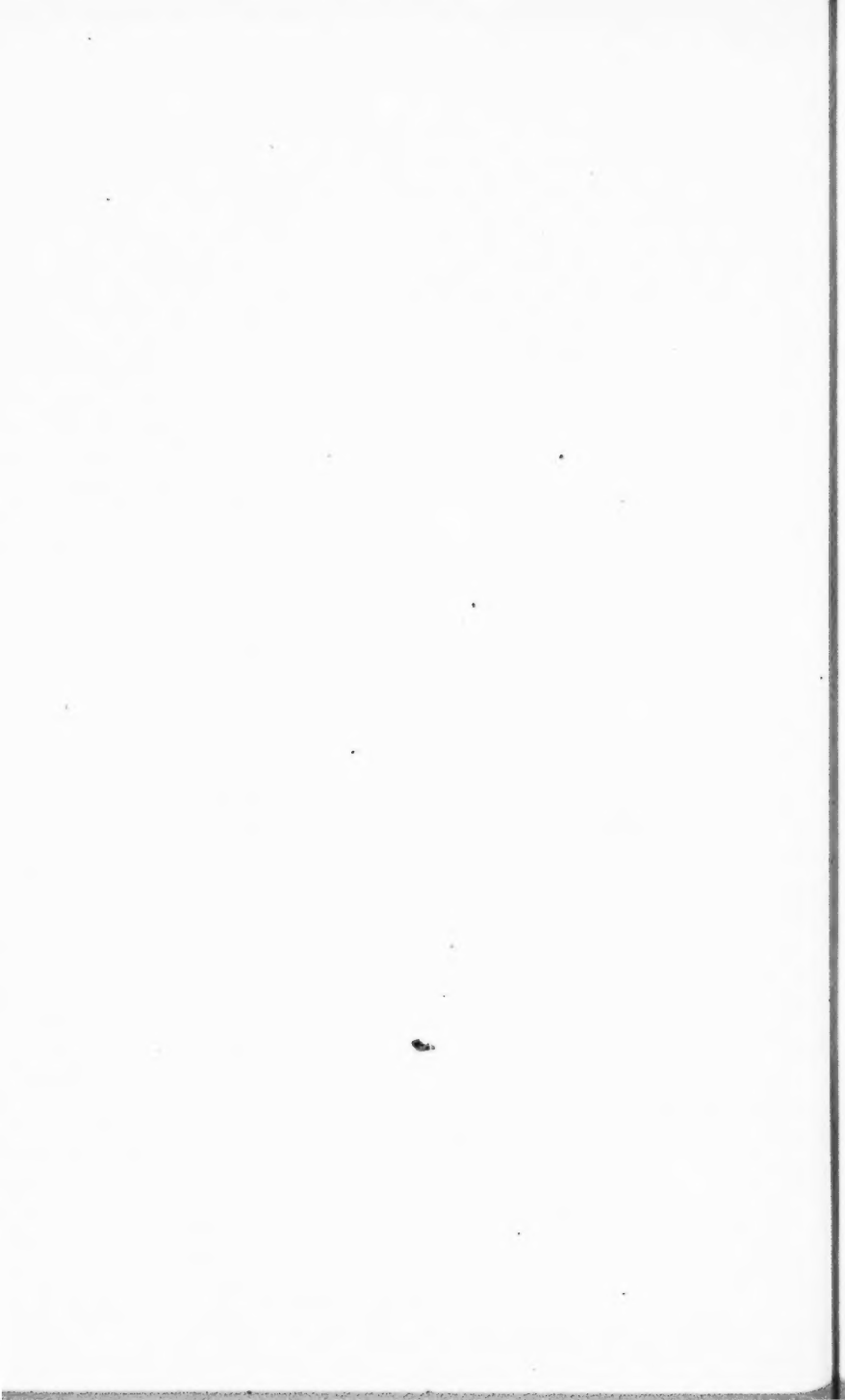
The said marshal is allowed to have and retain a commission of 5 per centum for his services in receiving and disbursing the funds so deposited with him, and he will make a report of his transactions, receipts, and disbursements in the premises to the court.

Any notices to be given in connection with the execution of this decree may be given to the Attorneys General of the respective states.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Referring Cause to Master.



IN THE SUPREME COURT OF THE UNITED STATES.

No. 4, Original,—October Term, 1907.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

DECREE ENTERED MAY 4TH, 1908, REFERRING CAUSE TO MASTER.

This cause having been heard upon the pleadings and accompanying exhibits, it is, on consideration, ordered that it be referred to a special master, to be hereinafter designated, to ascertain and report to the court:

1. The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidence of said indebtedness.

2. The extent and valuation of the territory of Virginia and of West Virginia, June 20, 1863, and the population thereof, with and without slaves, separately.

3. All expenditures made by the Commonwealth of Virginia with the territory now constituting the State of West Virginia since any part of the debt was contracted.

4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of

Virginia, with and without slaves, as shown by the census of the United States.

5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia.

6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union.

7. The amount and value of all money, property, stocks and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items and not including any property, stocks or credits which were obtained or acquired by the Commonwealth after the date of the organization of the restored government of Virginia, together with the nature and description thereof.

The answers to these inquiries to be without prejudice to any question in the cause.

It is further ordered that the Commonwealth of Virginia and the State of West Virginia shall each, when required, produce before the master, upon oath, all such records, books, papers and public documents as may be in their possession or under their control, and which may, in his judgment, be pertinent to the said inquiries and accounts, or any of them.

And the master is authorized to make or cause to be made, such examination as he may deem desirable of the books of account, vouchers, documents and public records of either State relating to the inquiries he is herein directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All public records published by authority of the Commonwealth of Virginia prior to the 17th day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid, which in the judgment of the master may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two States since the admission of West Virginia into the Union shall be evidence, if pertinent and duly

authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him, or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

The master is authorized and empowered, subject to the approval of the Chief Justice, to employ such stenographers and other clerical assistants as he may find it desirable to employ in order to the prompt and efficient execution of this order of reference, and to agree with such stenographers and typewriters and clerical assistants upon such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

The complainant shall cause the sum of five thousand dollars to be deposited with the marshal of this court to the credit of this cause, and such further sums as from time to time may be required, on account of the costs and expenses of executing this decree; and the master is authorized from time to time to draw upon the fund so deposited by Virginia for the compensation of the stenographers, typewriters and other clerical assistants whom he may employ, and for any other costs and expenses, including stationery and printing, which may in his judgment be necessary to be incurred in executing this order of reference.

The said marshal shall receive such commission for his services in receiving and disbursing the funds so deposited with him as may be allowed by the court, and he will make a report of his transactions, receipts and disbursements in the premises.

Any notices to be given in connection with the execution of this decree may be given by and to the Attorney General of the respective States.

The master will make his report with all convenient speed and transmit therewith the evidence on which he proceeds, and is to be at liberty to state any special circumstances he considers of importance, and to state such alternative accounts as may be desired by either of the parties, subject to the direction of the court.

And the court reserves the consideration of the allowance of interest; of the costs of this suit, and all further directions until

after the master has made his report; either of the parties to be at liberty to apply to the court as they shall be advised.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Order by the Court.



IN THE SUPREME COURT OF THE UNITED STATES.

No. 4, Original.—October Term, 1907.

COMMONWEALTH OF VIRGINIA

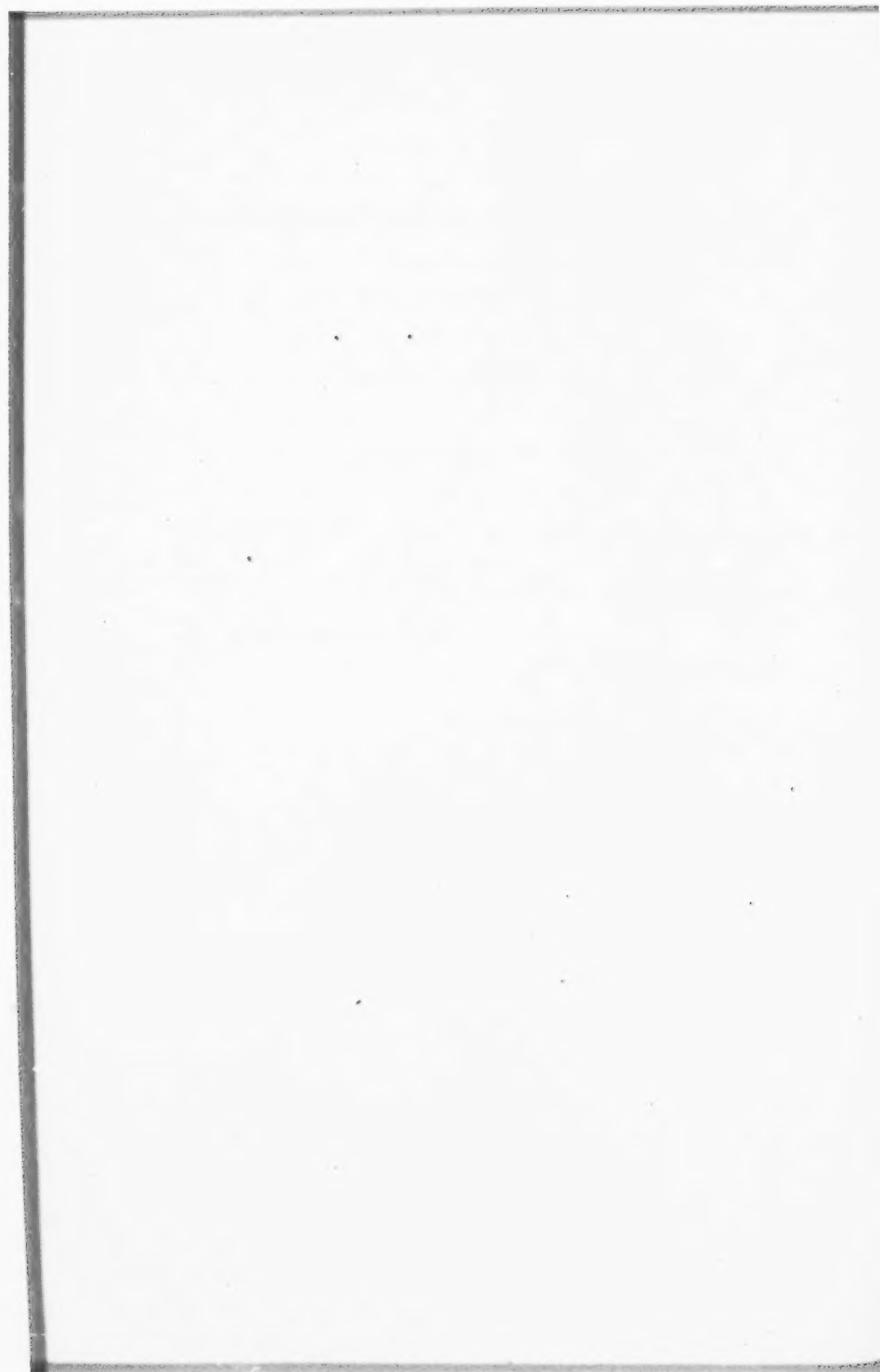
vs.

STATE OF WEST VIRGINIA.

It is ordered by the Court that counsel for the respective parties in this cause have leave to submit on or before the 18th instant the name of fit persons for appointment as Master to take the testimony herein.

Per MR. CHIEF JUSTICE FULLER.

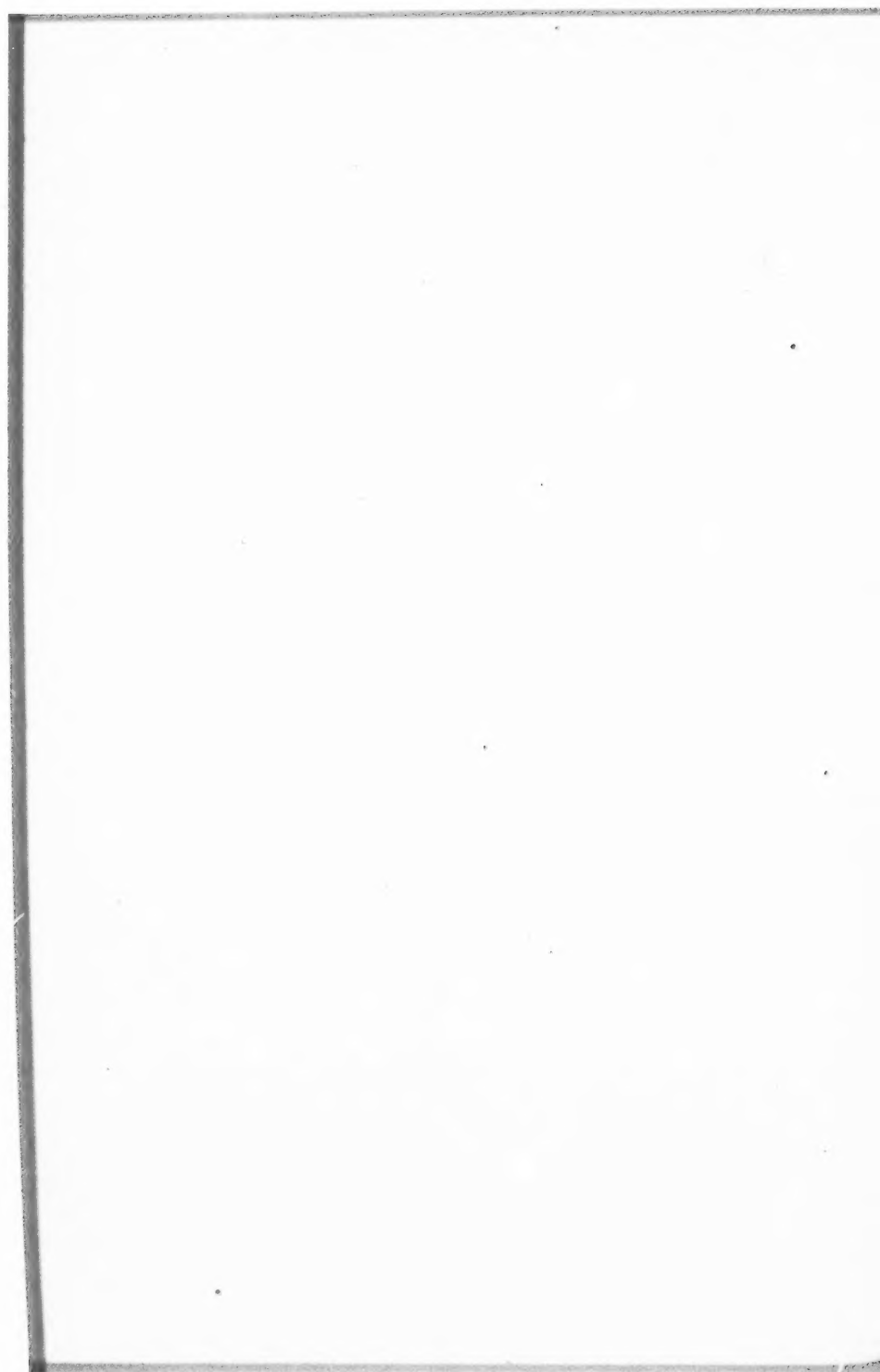
May 4th, 1908.



Supreme Court of the United States.

OCTOBER TERM, 1907.

Recommendation by Defendant.



IN THE SUPREME COURT OF THE UNITED STATES.

No. 4, Original.—October Term, 1907.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

Now cometh the defendant, the State of West Virginia, by her counsel of record, and in pursuance of the order of this Court entered on the 4th day of May, 1908, doth respectfully submit the names of the persons hereinbelow set out, either of whom as the defendant believes and avers, would be a fit person for the appointment as Master to take the testimony under the decree in this cause entered on May 4th, 1908, to-wit:

Mr. JOHN W. YERKES, of Kentucky;

Mr. CHARLES E. LITTLEFIELD, of Maine.

We respectfully say to the Court that in the selection of these names we have deemed it proper and right not to consider any citizen of the Commonwealth of Virginia or of the State of West Virginia or of the Cities of New York, Philadelphia, Baltimore, or any of the other money centers where the so-called "West Virginia Certificates" are owned, or are sold or traded in, on stock exchanges or exchanges of a similar nature.

Respectfully submitted,

W. G. CONLEY,

Attorney General.

JOHN G. CARLISLE,

JOHN C. SPOONER,

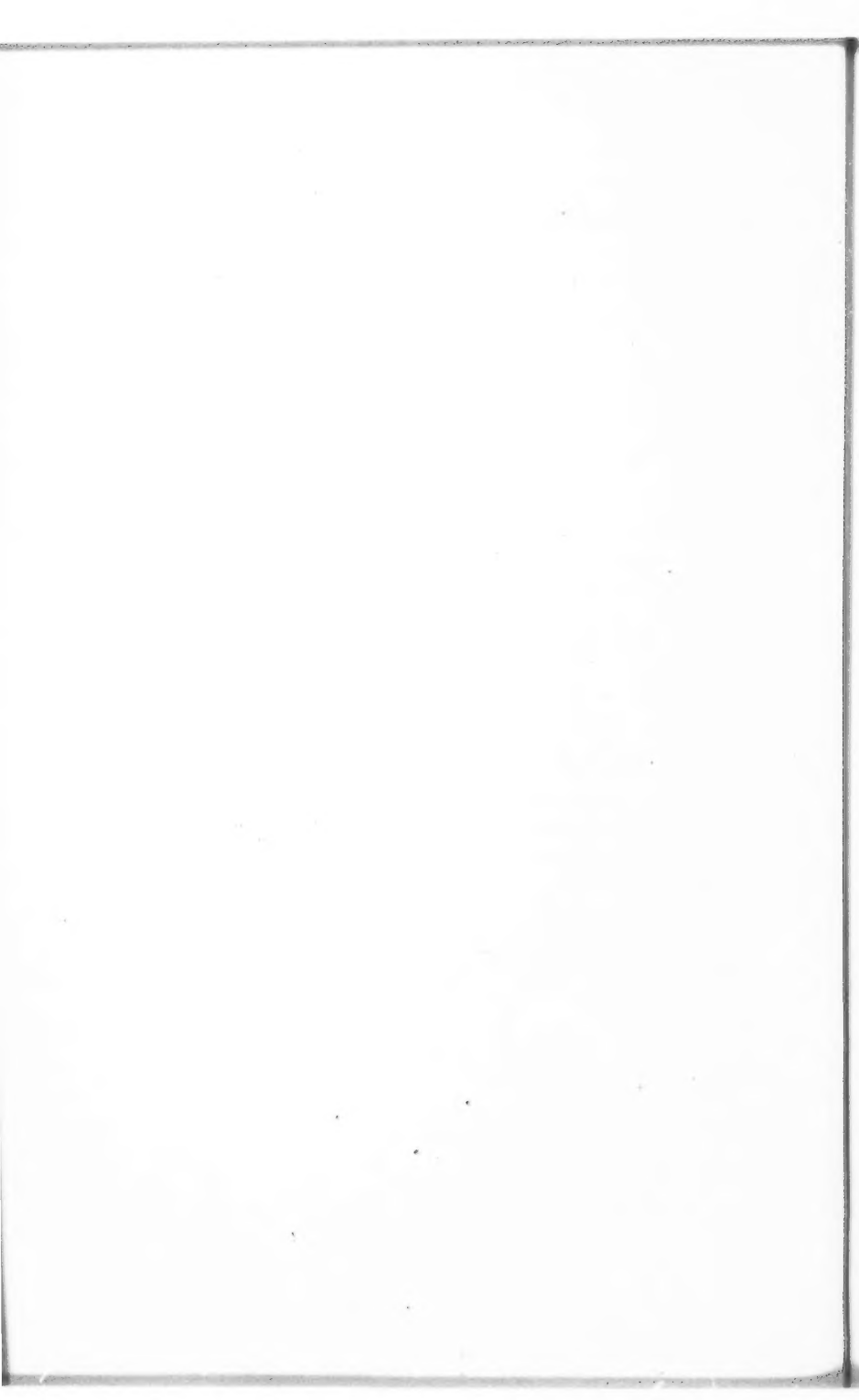
CHAS. E. HOGG,

W. MOLLOHAN,

GEO. W. MCCLINTIC,

W. G. MATHEWS,

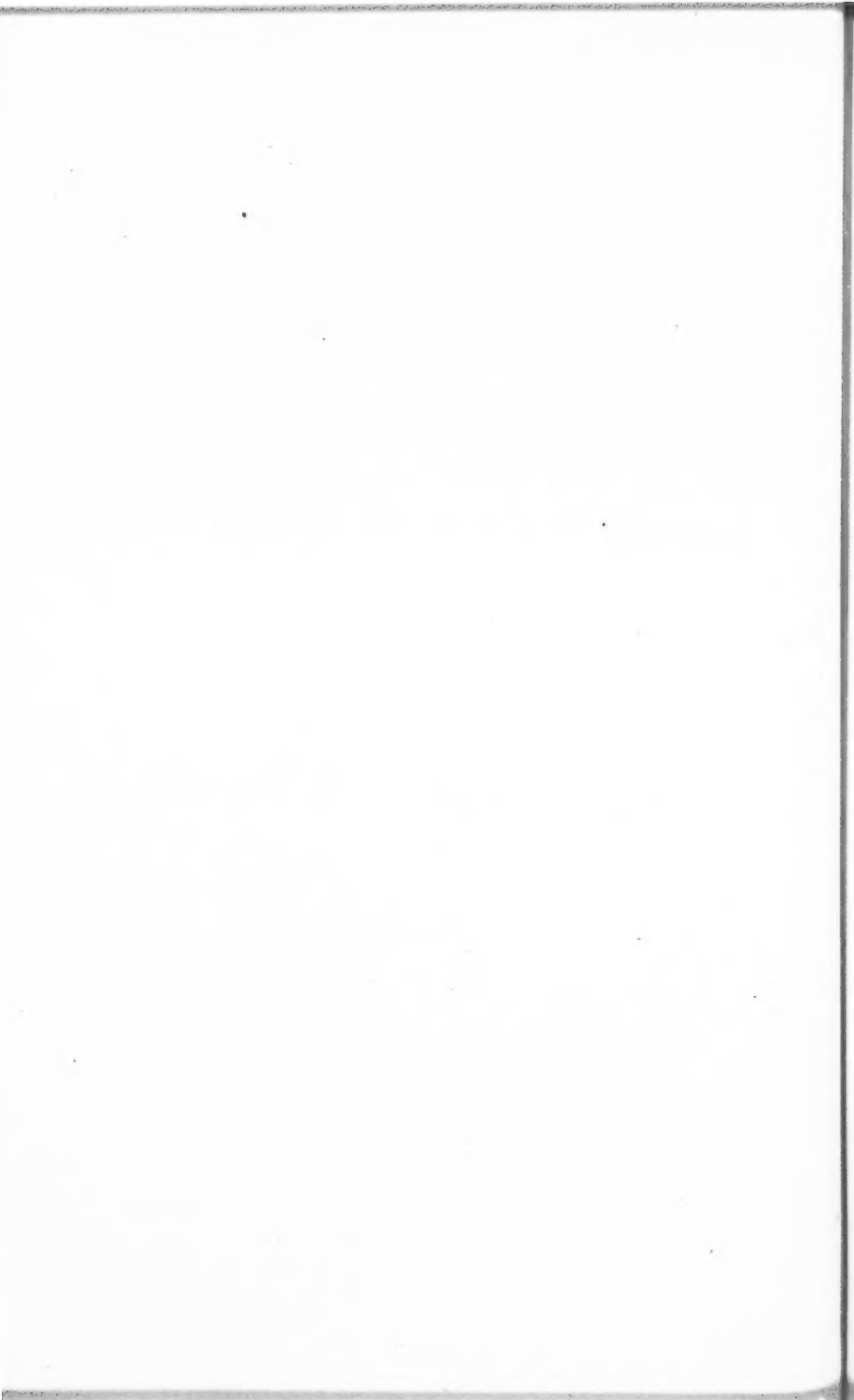
Of Counsel for Defendant.



Supreme Court of the United States.

OCTOBER TERM, 1907.

Recommendation by Plaintiff.



IN THE SUPREME COURT OF THE UNITED STATES.

No. 4, Original.

VIRGINIA, *Complainant,*

vs.

WEST VIRGINIA, *Defendant.*

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On behalf of the Commonwealth of Virginia, the undersigned beg to nominate as suitable persons from whom a selection may be made by the court of one to be appointed "special master" to ascertain and report on the several subjects indicated in the order of the court on the —— day of May, 1908, the following named gentlemen, *viz:*

Mr. J. J. DARLINGTON, of the District of Columbia;

Mr. GEORGE WHARTON PEPPER, of the city of Philadelphia.

Apart from the qualification of personal fitness, the residence of the master is regarded as a feature entitled to great consideration. He should be in a locality easily accessible to the counsel in the cause, and especially should he be where he could have easy and frequent access to the public records of Virginia, in the city of Richmond, from which nearly all the facts on which the inquiries he will be charged with conducting are to be found.

WILLIAM A. ANDERSON,

Attorney General of Virginia.

I cordially concur in the above nominations.

HOLMES CONRAD,
Of Counsel.

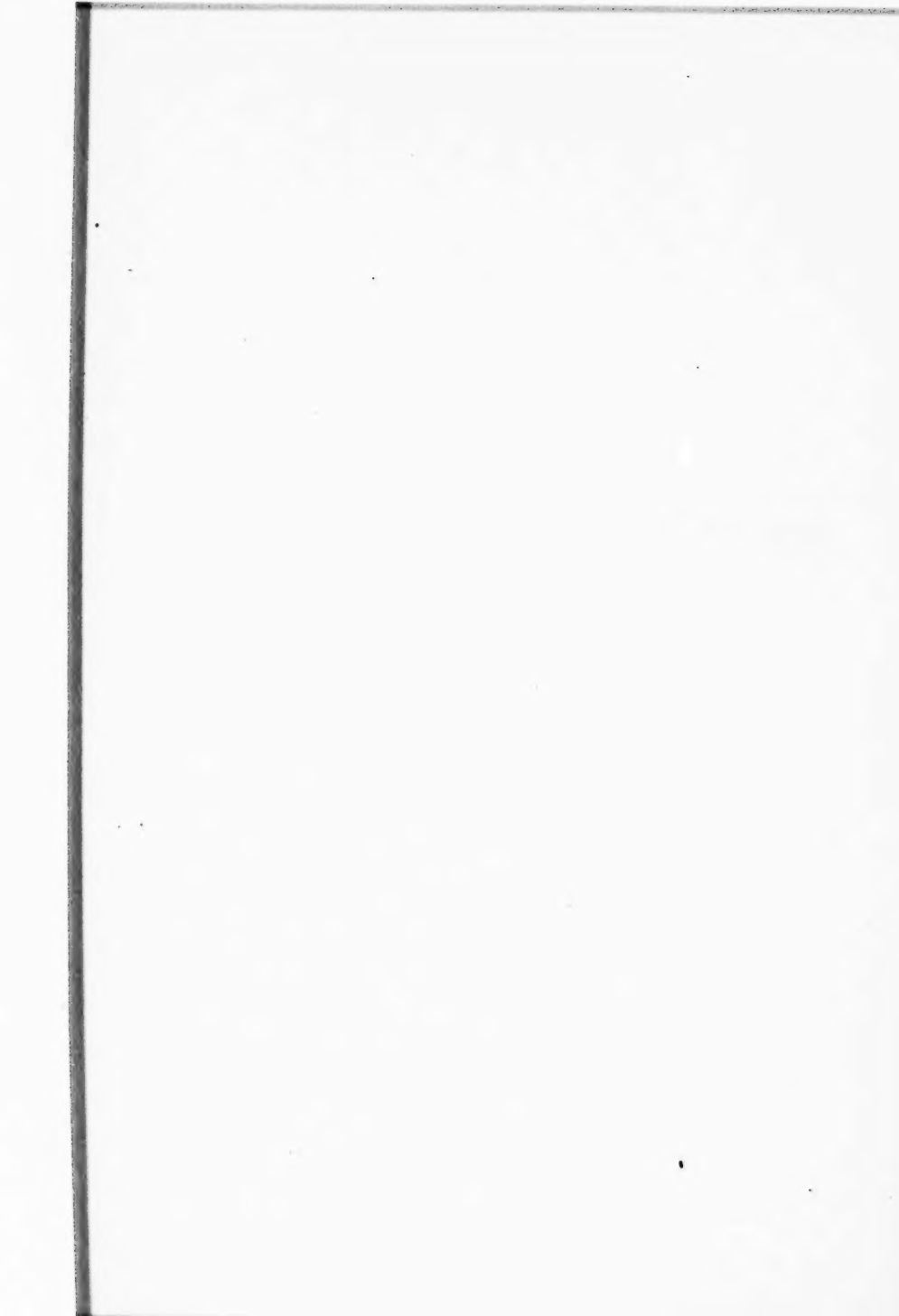
May 14, 1908.



Supreme Court of the United States.

OCTOBER TERM, 1907.

Brief for Virginia.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

Original No. 4.

IN EQUITY.

COMMONWEALTH OF VIRGINIA, *Complainant,*

vs.

STATE OF WEST VIRGINIA, *Defendant.*

Brief for Virginia, upon motion to enter decree referring the cause to a master.

Drafts of a decree referring the cause to a Master have been submitted on behalf of the complainant, and the defendant, respectively.

[I]

There are some differences going rather to matters of procedure than to any question of principle, between the provisions of paragraphs III and IV of complainant's draft, as compared with paragraph VII of defendant's draft, which will be apparent upon reading the two papers.

We respectfully ask that the provisions expressed in paragraphs III, IV and V of complainant's draft be embodied in the decree which the court shall enter, for reasons which will be apparent on reading those paragraphs.

[II]

Our serious objections to the defendant's draft of decree are particularly to paragraph II, but also to paragraphs III, IV and V thereof.

The draft submitted on behalf of the complainant directs the master to take an account ascertaining:

I.

"The amount of the public debt of the Commonwealth of Virginia as of the first day of January, 1861, stating specifically, how and in what form the same was evidenced, by what authority of law, and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness."

The defendant's draft adopts this paragraph.

Paragraph II of plaintiff's draft directs the master to take the following accounts:

II.

"What amount and proportion of said indebtedness and of the interest accrued thereon, should in equity be apportioned to and be now paid by the State of West Virginia."

Paragraph II of plaintiff's draft directs the master to take the following accounts:

II.

(a) "The amount of State expenditures made by the Commonwealth of Virginia prior to the first day of January, 1861, within the territory now included within the State of West Virginia since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia at Wheeling, August 20th 1861.

(b) "The aggregate ordinary expenses of the State government of the Commonwealth of Virginia, prior to January 1st, 1861, and since any part of said indebtedness was contracted.

(c) "All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during said period."

Paragraph III of plaintiff's draft directs that the master,

III.

“Will make and return with his report any special or alternative statements of the accounts between the complainant and the defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the court.”

We respectfully object to paragraph II of defendant's draft, on the ground that it seems to lend the sanction of the court in advance to a basis or scheme for the statement of the account, which is not shown by anything as yet in the cause to be either equitable or just.

Before any such question can be fairly adjudicated, it is necessary to the ends of justice, that there shall be a mass of evidence in the case, not yet introduced, which evidence the court should have the aid of its master in collating and thoroughly digesting.

There is by no means enough in the record to enable the court to come to any just or definite conclusion as to the precise scheme which it would be equitable to adopt in stating the account.

To do so at this stage of the litigation, would be to decide an important question in the case before the evidence necessary for a full understanding and just decision of that question is before the court. It would be largely to take a step in the dark, which might, and in all probability would, do injustice to one party or the other.

Our main objection to paragraph II of defendant's draft is that its effect manifestly is to have the court prejudge the case as to the basis on which the account shall be stated.

On the other hand, in the draft of decree tendered by counsel for Virginia, we have not asked the court to prejudge the case upon any controverted question of law or fact.

The case is not now being submitted for a decision upon its merits.

It is submitted for a decree referring it to a master, to state and report to the court the data necessary to enable the court to justly decide it upon its merits—and all the complainant desires is an opportunity to show the court and its master what is the fair and equitable basis upon which the account between the two States should be stated, under all of the circumstances of the case, as they shall appear when the evidence is all in.

If it should then appear that the basis prescribed by the Wheeling ordinance is binding upon the parties, and must be followed

as the basis upon which the account shall be made up, that basis would be adopted. But if it should be then manifest that that arbitrary basis of settlement is not the one on which the account should be stated, because it would, if applied to the facts of the case as they shall appear in the evidence, lead to absolutely unconscionable results and operate to impair the obligation of the contracts by which the common debt was created, contracts which were and are alike obligatory upon Virginia and upon West Virginia, or for any other valid reason, then the scheme of settlement indicated in the Wheeling ordinance would have to be discarded, and an equitable basis and scheme of settlement adopted.

It is due to frankness to say, that, while the Wheeling ordinance upon its face, prescribes an absolutely arbitrary basis of settlement, the representatives of Virginia are satisfied that upon a fair, reasonable and just construction of the language of that ordinance, and of the subsequent supplemental enactments, the scheme of settlement therein defined will, when applied to the facts as stated in the bill, and as it is believed they can be established by proofs, result in fixing the proportion of the debt of Virginia which West Virginia should assume and pay, inclusive of interest, at a very large sum, though not so large a sum as it would be equitable for West Virginia to pay.

The debt, a portion of which she was to pay, was an interest-bearing debt. It would be manifestly "just" and "equitable" that West Virginia should be required to pay interest as well as principal. Indeed, any settlement which does not require that State to pay interest during the long period of her default and refusal to pay anything, would be not only unjust, and inequitable, but iniquitous.

The ninth section of said ordinance required the new State "to take upon itself a *just* proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861."

And section 8 of Article VIII, of the first Constitution of West Virginia, under the provisions of which she became a State, required that:

"8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State;" and that "the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund *sufficient to pay the accruing interest* and redeem the principal within thirty-four years."

So, West Virginia came into the Union upon the distinct condition expressed in her Constitution, that she would assume an equitable proportion of the common debt of the undivided State, as it existed prior to January 1, 1861, and would provide for the payment of the accruing interest and the redemption of the principal thereof.

While it is believed that, upon the facts stated in the Bill and accompanying exhibits, and upon the proofs hereafter to be adduced in support thereof, West Virginia will owe a very large sum, even under the arbitrary scheme of the Wheeling ordinance, we submit that we should not, in the present status of the litigation, be tied down to the terms of that ordinance.

Indeed, its provisions were modified by the terms of the eighth section of Article VIII of the Constitution under which West Virginia was made a State, which provided that West Virginia should assume an equitable proportion of the common debt of the Commonwealth, principal and interest: And yet the defendant's draft excludes any item of interest from the account.

[III]

Another palpable objection to the defendant's draft is, that it excludes from the account the value of the property, assets, and money which West Virginia has received from the Commonwealth.

Upon any basis of just accounting, these items should be brought into the account.

If the account should be stated on the basis of the Wheeling ordinance, these items would manifestly be proper charges against West Virginia.

By the terms of that ordinance, Virginia's title to, and ownership of, all of the property and assets theretofore belonging to the Commonwealth remain intact.

By it, West Virginia would acquire no title to any of those assets or of that property. Framed as that ordinance was, by western Virginian's and arbitrary, and on its face unjust, as were the criteria by which it undertook to provide that West Virginia's proportion of the common debt should be computed, its authors were not so conscienceless as to also propose that the new State, after making such an inadequate contribution to its share of a debt which had been chiefly contracted by the votes of the representatives of its people and for their benefit, should also have a

share of the property and assets of the Commonwealth, free of charge.

All that was, by the terms of that ordinance, to be ceded by the Commonwealth to the new State, was political dominion, and jurisdiction over the people and territory embraced in the new State.

The meaning and effect of the ordinance was to leave the title to, and ownership of, the assets and property of the Commonwealth in the Commonwealth.

If nothing more had been done or said by Virginia as to that property and those assets, than was said in the Wheeling ordinance, none of it ever would have become the property of West Virginia.

The Virginians who were the creators of West Virginia, who sat in the Wheeling Convention on the 20th of August, 1861, who constituted the convention which framed the first Constitution of West Virginia, and who constituted the Legislature of the restored government of Virginia which sat in Wheeling in 1862, and in 1863, fully recognized this to be true, for, pending the formation of the new State, and before the Legislature of Virginia had in any form given its consent to its creation out of the territory of Virginia, the Legislature of the restored State of Virginia, whose authority was supreme over the territory and people afterwards constituting West Virginia, and binding upon them, on the 3rd and 4th of February, 1863, passed the acts copied in the appendix to this brief.

These statutes constituted a part of the enactments out of which the State of West Virginia had its birth. It is particularly true of the act of February 3, 1863, that it was fundamental, so far as West Virginia was concerned: for it constitutes her title deed to a vast quantity of property, the title to which by law and under the Wheeling ordinance, was vested in Virginia.

These statutes, together with the Wheeling ordinance, the first Constitution of West Virginia, the act of the United States Congress approved December 31, 1862, under which the new State was afterwards admitted into the Union, and the act of the Wheeling Legislature of May 13, 1862, constitute the constating instruments and acts by which her political existence was created, and her governmental powers and duties determined.

As was indicated by this court in its decision overruling the defendant's demurrer, the Wheeling ordinance, and Section 8 of

Article VIII of the first Constitution of West Virginia, must be taken and read together: So also these constating acts of February 3rd and 4th, 1863, and particularly of February 3, 1863, must be taken and read together with Section 9 of the Wheeling ordinance, and with Section 8 of Article VIII of the first West Virginia Constitution, as together prescribing the terms and conditions on which the consent of the Commonwealth was given to the formation of the new State out of her territory, and the transfer to that new State when formed of any portion of the assets and property of the parent State.

Property and money large in quantity and value were thereupon transferred by Virginia to West Virginia, for all of which West Virginia must account, not only as an equitable obligation resting upon her, under the circumstances, but as a legal obligation put upon her by positive and binding enactment.

All of these just items of charge against West Virginia, are excluded from the account to be directed by the court by the terms of defendant's draft.

For convenience of reference, the "Wheeling Ordinance," and the acts of the Legislature of Virginia at Wheeling, passed February 3rd and 4th, 1863, are printed as an appendix to this brief.

[IV]

Another objection to the account called for by defendant's draft, is that it does not direct *any account to be taken ascertaining the amount and proportion of the debt of Virginia on and prior to January, 1, 1861, which West Virginia should assume and pay*, but contents itself with merely directing the arbitrary and inconsequential accounts defined in paragraph II of defendant's draft.

But our principal insistance is that defendant's draft of a decree prejudices the case in advance of a hearing upon the merits, while that tendered for the plaintiff cannot operate to the prejudice of either party, upon any material question in the cause; by this draft the adjudication of these questions being left to await a hearing after the Master's report shall be filed, upon the evidence then fully in the cause.

[V]

The precise accounts called for by paragraph II of defendant's

draft will be taken by the Master if he shall find it necessary and proper to take them in order to ascertain the amount and proportion of the Virginia debt which West Virginia should pay; and if the Master shall for any reason deem it unnecessary to take those accounts, the defendant can, under paragraph III of complainant's draft, have them stated as special accounts, if she shall be so advised.

Paragraph II of complainant's draft is designed to enable each party, or the Master, to have alternative, or special statements of the accounts made up on any basis on which either party or the Master may deem it proper or desirable that the same shall be stated.

By having the respective views and contentions of the complainant and the defendant thus presented in contrast in such concrete form, the court, with the assistance of the findings of the Master, will be enabled more readily and intelligently to reach a just conclusion.

[VI]

If the inquiries defined in paragraphs III, IV, V and VI of defendant's draft have any pertinency to any question in the case, it must be because of something not yet in the record.

We object to them as being unnecessary and irrelevant.

(a) There is nothing in the cause, or so far as we know out of it, to show that there is any foundation in fact for the inquiry mentioned in paragraph III of defendant's draft, as to whether Virginia has made any other contracts or arrangements with the public creditors, since January 1, 1861, in reference to the public debt. So that inquiry, though harmless, is useless.

(b) The accounts provided for in paragraphs IV and V of defendant's draft, are not pertinent to any issue in the cause.

Both relate to the certificates or receipts given by Virginia to the holders of the bonds issued by the Commonwealth before her dismemberment, who have deposited these bonds with her.

Those certificates are in the nature of a declaration of trust by Virginia, that she holds said bonds (so far as they have not been funded in the new securities which the Commonwealth has given for about two-thirds of the aggregate amount thereof, principal and interest), for the benefit of the owners of the bonds deposited with her.

It is impossible to see how those transactions could in any way affect any question which will arise in this cause.

The only function of those certificates is to show who are now entitled to the bonds which were so deposited with Virginia, and which she holds in her treasury for the benefit of these certificate holders, awaiting a settlement with West Virginia.

As is true of the inquiries mentioned in paragraph III, of defendant's draft, the objection to those provided for by paragraphs IV and V are that they are unnecessary and useless.

(c) The same objection applies to paragraph VI of defendant's draft. That relates to the obligations which were issued by Virginia, as now constituted, in settlement of the two-thirds of the old bonds funded, and payment of which was assumed by her.

That is a matter with which West Virginia has nothing to do, and which does not affect the rights or obligations of either party in respect to the claims asserted in complainant's bill.

Those new bonds given by Virginia for the two-thirds of the old bonds assumed by her, and accepted by the owners of the old bonds so deposited with Virginia, operated as a payment and discharge of the old bonds to the extent of the two-thirds thereof so funded.

West Virginia is not sued here to pay any part of that two-thirds so settled by Virginia. She is sued to have her assume and pay so much of the remaining unfunded third of the common debt of the undivided State, as may be West Virginia's equitable portion of the whole of the debt represented by the bonds of the original State. It has never been claimed or suggested that there was any liability on West Virginia beyond said unfunded third of the bonds of the original State which have been funded; or that West Virginia should pay more than one-third of the bonds issued by Virginia prior to the formation of West Virginia, which have not been funded.

The liability of West Virginia on account of the common public debt, has sometimes been estimated by Virginia or her representatives at one-third thereof, but never at more than one-third, and Virginia has undertaken to take care of the other two-thirds with which West Virginia has nothing to do.

It is true, that there are some millions of the debt of the undivided State, which Virginia has paid in full, and holds the obligations so taken up by her as a claim against the new State, to the extent of West Virginia's equitable liability for contribution therefor; and the extent of that liability can be ascertained

and stated in the account directed by paragraph II of complainant's draft.

There is no occasion for any of the accounts directed by paragraphs III, IV, V and VI of defendant's draft. If West Virginia wants any of them to be stated, she can have that done as a special statement under paragraph III of complainant's draft.

[VII]

We object generally to the defendant's draft, that it does not direct the accounts which are necessary to be taken in order to intelligently, definitely, and fairly determine the amount and proportion of the debt of the undivided State, which West Virginia is equitably and justly bound to pay.

Respectfully submitted,

WILLIAM A. ANDERSON,

Counsel for Virginia.

APPENDIX.

Copy of the ordinance adopted by "the Wheeling Convention," providing for the formation of the new State afterwards called West Virginia.

AN ORDINANCE.

To provide for the formation of a new State out of a portion of the territory of this State.

(Passed August 20, 1861.)

Whereas, it is represented to be the desire of the people inhabiting the counties hereinafter mentioned, to be separated from this Commonwealth, and to be erected into a separate State, and admitted into the Union of States, and become a member of the government of the United States:

1. The people of Virginia, by their delegates assembled in convention at Wheeling, do ordain that a new State, to be called the State of Kanawha, be formed and erected out of the territory included within the following described boundary: beginning on the Tug Fork of Sandy river, on the Kentucky line where the

counties of Buchanan and Logan join the same; and running thence with the dividing lines of said counties and the dividing line of the counties of Wyoming and McDowell to the Mercer county line, and with the dividing line of the counties of Mercer and Wyoming to the Raleigh county line; thence with the dividing line of the counties of Raleigh and Mercer, Monroe and Raleigh, Greenbrier and Raleigh, Fayette and Greenbrier, Nicholas and Greenbrier, Webster, Greenbrier and Pocahontas, Randolph and Pocahontas, Randolph and Pendleton, to the southwest corner of Hardy county; thence with the dividing line of the counties of Hardy and Tucker, to the Fairfax Stone; thence with the line dividing the States of Maryland and Virginia, to the Pennsylvania line; thence with the line dividing the States of Pennsylvania and Virginia, to the Ohio river; thence down said river, and including the same, to the dividing line between Virginia and Kentucky, and with the said line to the beginning; including within the boundaries of the proposed new State the counties of Logan, Wyoming, Raleigh, Fayette, Nicholas, Webster, Randolph, Tucker, Preston, Monongalia, Marion, Taylor, Barbour, Upshur, Harrison, Lewis, Braxton, Clay, Kanawha, Boone, Wayne, Cabell, Putnam, Mason, Jackson, Roane, Calhoun, Wirt, Gilmer, Ritchie, Wood, Pleasants, Tyler, Doddridge, Wetzel, Marshall, Ohio, Brooke, and Hancock.

2. All persons qualified to vote within the boundaries aforesaid, and who shall present themselves at the several places of voting within their respective counties, on the fourth Thursday in October next, shall be allowed to vote on the question of the formation of a new State, as hereinbefore proposed; and it shall be the duty of the commissioners conducting the election at the said several places of voting, at the same time, to cause polls to be taken for the election of delegates to a convention to form a Constitution for the government of the proposed State.

3. The convention hereinbefore provided for may change the boundaries described in the first section of this ordinance, so as to include within the proposed State the counties of Greenbrier and Pocahontas, or either of them, and also the counties of Hampshire, Hardy, Morgan, Berkeley and Jefferson, or either of them, and also such other counties as lie contiguous to the said boundaries, or to the counties named in this section; if the said counties to be added, or either of them, by a majority of the votes given, shall declare their wish to form part of the proposed State, and

shall elect delegates to the said convention, at elections to be held at the time and in the manner herein provided for.

4. Poll books shall be prepared under the direction of the governor for each place of voting in the several counties hereinbefore mentioned, with two separate columns, one to be headed "For the New State," the other "Against the New State." And it shall be the duty of the commissioners who superintended, and the officers who conducted the election in May last, or such other persons as the governor may appoint, to attend at their respective places of holding elections, and superintend and conduct the election herein provided for. And if the said commissioners and officers shall fail to attend at any such place of holding elections, it shall be lawful for any two freeholders present to act as commissioners in superintending the said election, and to appoint officers to conduct the same. It shall be the duty of the persons superintending and conducting said election, to employ clerks to record the votes, and to endorse on the respective poll books the expenses of the same.

If on the day herein provided for holding said election, there shall be in any of the said counties any military force, or any hostile assemblage of persons, so as to interfere with a full and free expression of the will of the voters, they may assemble at any other place within their county, and hold an election as herein provided for. It shall be the duty of the commissioners superintending, and officers conducting said election, and the clerks employed to record the votes, each before entering upon the duties of his office, to take, in addition to the oath now required by the general election law, the oath of office prescribed by this convention. It shall be the duty of the officers and commissioners aforesaid, as soon as may be, and not exceeding three days after said election, to aggregate each of the columns of said poll books, and ascertain the number of votes recorded in each, and make a return thereof to the Secretary of the Commonwealth, in the city of Wheeling, which return shall be in the following form, or to the following effect:

We,, commissioners, and conducting officer, do certify, that we caused an election to be held at, in the county of at which we permitted all persons to vote that were entitled to do so under existing laws, and that offered to vote, and that we

have carefully added up each column of our poll books, and find the following results:

For a new State, votes; Against a new State,
..... votes.

Given under my hand, this day of,
1861.

Under which certificate there shall be added the following affidavit:

..... County, To-wit:

I,, a justice of the peace, (or any officer now authorized by law to administer oaths,) in and for said county, do certify that the above named commissioners and conducting officer severally made oath before me, that the certificate by them above signed is true.

Given under our hand, this day of,
1861.

The original poll books shall be carefully kept by the conducting officers for ninety days after the day of election and upon the demand of the executive shall be delivered to such person as he may authorize to demand and receive them.

5. The commissioners conducting the said election in each of said counties shall ascertain, at the same time they ascertain the vote upon the formation of a new State, who has been elected from their county to the convention, hereinbefore provided for, and shall certify to the Secretary of the Commonwealth the name or names of the person or persons elected to the said convention.

6. It shall be the duty of the governor, on or before the fifteenth day of November next, to ascertain and by proclamation make known the result of the said vote; and if a majority of the votes given within the boundaries mentioned in the first section of this ordinance, shall be in favor of the formation of a new State, he shall so state in his said proclamation, and shall call upon said delegates to meet in the city of Wheeling, on the 26th day of November next, and organize themselves into a convention; and the said convention shall submit, for ratification or rejection, the Constitution that may be agreed upon by it, to the qualified voters within the proposed State, to be voted upon by the said voters on the fourth Thursday in December next.

7. The counties of Ohio shall elect three delegates; the counties of Harrison, Kanawha, Marion, Marshall, Monongalia, Preston, and Wood shall each elect two; and the other counties named

in the first section of this ordinance shall each elect one delegate to the said convention. And such other counties as are described in the third section of this ordinance, shall, for every thousand of the population according to the census of 1860, be entitled to one delegate, and to an additional delegate for any fraction over thirty-five hundred; but each of said counties shall be entitled to at least one delegate. The said delegate shall receive the same per diem as is now allowed to members of the general assembly; but no person shall receive pay as a member of the general assembly and of the convention at the same time.

8. It shall be the duty of the governor to lay before the general assembly, at its next meeting, for their consent according to the constitution of the United States, the result of the said vote, if it shall be found that a majority of the votes cast be in favor of a new State, and also in favor of the constitution proposed to said voters for their adoption.

9. The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.

The lands within the proposed State of non-resident proprietors shall not in any case be taxed higher than the lands of residents therein. No grants of lands or land warrants issued by the proposed State, shall interfere with any warrant issued from the land office of Virginia prior to the 17th day of April last, which shall be located on lands within the proposed State now liable thereto.

10. When the general assembly shall give its consent to the formation of such new State, it shall forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the said new State may be admitted into the union of States.

11. The government of the State of Virginia as re-organized by this convention at its session in June last, shall retain, within the territory of the proposed State, undiminished and unimpaired, all the powers and authority with which it has been vested, until the proposed State shall be admitted into the Union by the Congress of the United States; and nothing in this ordinance contained, or which shall be done in pursuance thereof, shall impair or affect the authority of the said re-organized State government in any county which shall not be included within the proposed State.

(SIGNED)

A. I. BOREMAN, *President.*

(SIGNED)

G. L. CRANMER, *Secretary.*

Copies of acts passed by the Legislature of Virginia, at Wheeling, February 3rd, and February 4th, 1863.

CHAPTER 68.—*An ACT transferring to the proposed State of West Virginia, when the same shall become one of the United States, all this State's interest in property, unpaid and uncollected taxes, fines, forfeitures, penalties and judgments, in counties embraced within the boundaries of the proposed State aforesaid.*

Passed February 3, 1863.

1. Be it enacted by the General Assembly of Virginia, That all property, real, personal and mixed, owned by or appertaining to this State, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to and become the property of the State of West Virginia, and without any other assignment, conveyance, transfer or delivery than is herein contained; and shall include among other things not herein specified, all lands, buildings, roads, and other internal improvements, or parts thereof situated within the said boundaries, and now vested in this State, or in the president and directors of the board of the literary fund, or the board of public works thereof, or in any person or persons, for the use of this State to the extent of the interest and estate of this State therein; and shall also include the interest of this State, or of the said president and directors, or of the said board of public works, in any parent bank or branch

doing business within the said boundaries; and all stocks of any other company or corporation, the principal office or place of business whereof is located within the said boundaries standing in the name of this State or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this State.

2. Be it further enacted, That all unpaid and uncollected arrearages of taxes on lands, town lots, property tax, capitation tax, license tax, militia fines, fines imposed by courts, forfeitures and penalties, belonging to the State in the hands of sheriffs, collectors or individuals, in any or all of the counties embraced within the boundaries of the proposed State of West Virginia, as also all bonuses on the capital stock of any bank, taxes on the dividends declared by any bank, savings institution or insurance company; dividends on stock owned by the State, or by the board of public works, or the president and directors of the board of the literary fund, in any bank, bridge or other corporation in any one of the counties aforesaid; also taxes on seals, deeds, wills, writs and other legal processes due from the clerks of the courts, notaries public or the secretary of the commonwealth; taxes on passengers and tonnage due from railroad companies, taxes on bank notes or other property transported by express companies within the counties aforesaid; also all fines, forfeitures and penalties incurred by railroad, express companies or other parties or persons within the counties aforesaid; also all judgments, decrees or penalties incurred by officers of the State, railroad or express companies, or other persons before or since the reorganization of the State government at the city of Wheeling; also all suits and their results now pending in the name of the board of public works, or of the president and directors of the board of the literary fund in any court of any of the counties aforesaid; also all taxes on lands, town lots, property tax, capitation tax, assessed in the counties aforesaid, and due the State for the year eighteen hundred and sixty-three, in the hands of officers of the State or individuals, together with all the rights of the State, or of the board of public works, or of the president and directors of the board of the literary fund to any and all moneys and claims in the counties aforesaid that may not be specifically mentioned in this act, but that rightfully belong to the State or corporations for the use of the State, shall be the property of the State of West Virginia, when the same shall become one of the United States.

3. It shall be the duty of all sheriffs or collectors of the public revenue, also of the presidents or other officers of railroad, express, bridge or internal improvement companies, presidents and other officers of banks, savings banks and insurance companies, clerks of courts, notaries public, the secretary of the commonwealth, and of individuals owing or having money in their hands due the State, or the board of public works, or the president and directors of the board of the literary fund, in any of the counties aforesaid, to pay the same into the treasury of the State of West Virginia, when the same shall become one of the United States.

4. Be it further enacted, For the purpose of carrying this act into effect, that suits may be brought in the name of the commonwealth for the use of the State of West Virginia, when it becomes one of the United States, on any bond or claim which shall pass to or become the property of the State of West Virginia by virtue of this act.

5. Be it further enacted, That if the appropriations and transfers of property, stocks and credits provided for by this act take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State: provided that no such property, stocks and credits shall have been obtained since the reorganization of the State government.

6. It shall be the duty of the auditor of public accounts, the secretary of state, the treasurer and the adjutant-general of this commonwealth to procure fit and proper blank books for the purpose, and cause to be transcribed therein true copies of all such records, official acts, orders, minutes and memoranda, and like copies of original papers upon which any such official action was based, which from its locality or general state interest appertains to and will be useful and advantageous to the State of West Virginia; and the officers aforesaid shall severally certify to the governor of this commonwealth the correctness of their respective copies; and it shall be the duty of the governor to certify to all whom it may concern, the official character of such officers so certifying under the great seal of this commonwealth, and deliver all such copies to the governor of West Virginia, when his election is officially declared, for the use of said State of West Virginia.

7. This act shall take effect when the proposed State of West Virginia shall become one of the United States.

CHAPTER 72.—*An ACT making an appropriation to the proposed new State of West Virginia when the same shall become one of the United States.*

Passed February 4, 1863.

1. Be it enacted by the General Assembly of Virginia, That the sum of one hundred and fifty thousand dollars be, and is, hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

2. Be it further enacted, That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States; provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State.

3. Be it further enacted, That the act passed May fourteenth, eighteen hundred and sixty-two, making an appropriation of one hundred thousand dollars to the State of West Virginia be, and the same is hereby repealed.

4. This act shall be in force from passage.

Supreme Court of the United States

OCTOBER TERM, 1907.

Brief for Defendant.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

In Equity.—Original No. 4.

COMMONWEALTH OF VIRGINIA, *Complainant*,

against

WEST VIRGINIA, *Defendant*.

BRIEF FOR DEFENDANT ON COMPLAINANT'S MOTION TO REFER CAUSE
TO MASTER.

The complainant proposes an interlocutory decree referring the cause to a master with a direction to the master to take an account ascertaining

I.

"The amount of the public debt of the Commonwealth of Virginia as of the First day of January, 1861, stating specifically how and in what form the same was evidenced and by what authority of law and *for what purposes the same was created* and the dates and nature of bonds or other evidences of said indebtedness."

This paragraph was adopted in the decree proposed by the defendant, although in our view entirely unnecessary; but, upon reflection, it seems to require amendment in order to conform it to the allegations of the bill and the admission of the Answer. The words "for what purposes the same was created" imply that the debt was

created for diverse purposes. The bill alleges that "on the first day of January, 1861, your Oratrix was indebted in about the sum of \$33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory."

The bill is burdened with allegations as to the internal improvements, the motive which led the Commonwealth of Virginia to enter upon the policy, etc. The first sentence of paragraph I. of the Answer is as follows:

"That she believes it is true as alleged that on the first day of January, 1861, plaintiff was indebted in 'about' the sum of \$33,000,000, upon obligations and contracts made in connection with the construction of works of internal improvements within her then territory."

Then, upon the allegation of the bill that the indebtedness of about \$33,000,000, as it existed prior to January 1st, 1861, was incurred in connection with the construction of works of internal improvement, both parties are by bill and Answer in accord. In so far, therefore, as paragraph I of the proposed decree calls for an investigation into the purposes for which the same was created, if by "purposes" it means for the accomplishment of objects other than the construction of works of internal improvement, it is a departure from the fact established by the pleadings. Unless that is admissible, which we deny, the paragraph is objectionable for its uncertainty of expression. It would be better in accord with the Bill and Answer, and more useful to the court and to the parties, if the words were stricken out and there were inserted in their place: "for what particular works of internal improvement the same was created and its proceeds expended and where the same were located."

II.

"What amount and *proportion* of said indebtedness and *what interest* accruing thereon *should in equity be apportioned to and be now paid by the State of West Virginia.*"

The defendant's objection to Paragraph two is radical and will fully appear in the argument submitted herein in support of *its* proposed Paragraph two.

The remaining paragraphs of the decree proposed by the complainant need not here be set forth.

On the other hand, the defendant proposes a decree which directs the master to ascertain:

II.

(a) "The amount of State expenditures made by the Commonwealth of Virginia prior to the First day of January, 1861, within the territory now included within the State of West Virginia, since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia at Wheeling, August 20th, 1861."

(b) "The aggregate ordinary expenses of the State government of the Commonwealth prior to January 1st, 1861, and since any part of said indebtedness was contracted."

(c) "All moneys paid into the treasury of the Commonwealth of Virginia from the Counties included in the State of West Virginia during said period."

Paragraph III. of the complainant's proposed decree directs that the master:

"III. Will make and return with his report any special or alternative statement of the account between the complainant and defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the Court."

The difference between the two proposed decrees above quoted is radical, and presents to the Court a question which in our view is fundamental and which West Virginia contends, respectfully and very earnestly, should be decided before any reference to a master to state the account between the parties.

The jurisdiction of the Court over this case is settled by the decision overruling the demurrer. We are quite aware that the Court has recognized a distinction between suits by private parties in respect of the application of the rules of pleading and of practice, and suits between States. Thus it was held, in *Rhode Island vs. Massachusetts* (13 Peters, 23), that:

"From the character of the parties, and the nature of the controversy, we cannot, without committing great injustice, apply to this case the rules as to time, which govern Courts of Equity in suits between individuals. In the last-mentioned cases, the material allegations in the bill are comparatively few in number, and rest in the personal knowledge of the individual who is to put in his answer. But a case like this, and one, too, of so many years' standing, the parties, in the nature of things, must be incapable of acting with the promptness of an individual."

In Rhode Island vs. Massachusetts (14 Peters, 256), the Court, through Mr. Chief Justice TANEY, says:

"The case to be determined is one of peculiar character, and altogether unknown in the ordinary course of judicial proceedings. It is a question of boundary between two sovereign states, litigated in a Court of justice; and we have no precedents to guide us in the forms and modes of proceeding, by which a controversy of this description can most conveniently, and with justice to the parties, be brought to a final hearing. The subject was, however, fully considered at January term, 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion the Court determined to frame their proceedings according to those which had been adopted in the English Courts, in cases most analogous to this, where the boundaries of great political bodies had been brought into question. And acting upon this principle, it was then decided, that the rules and practice of the Court of Chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded is fully stated in the opinion then delivered; and upon re-examining the subject, we are quite satisfied as to the correctness of this decision (12 Peters, 735, 739).

"The proceedings in this case will therefore be regulated by the rules and usages of the Court of Chancery. Yet, in a controversy where two sovereign states are contesting the boundary between them, it will be the duty of the Court to mould the rules of Chancery practice and pleading in such manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of Chancery pleading. And if it appears that the plea put in by the defendant may in any degree embarrass the complainant in bringing out the proofs of her claim, on which she relies, the case ought not to be disposed of on such an issue. Undoubtedly the defendant must have the full benefit of the defense which the plea discloses; but at the same time, the proceedings ought to be so ordered as to give the complainant a full hearing upon the whole of her case. In ordinary cases between individuals the Court of Chancery has always exercised an equitable discretion in relation to its rules of pleading whenever it has been found necessary to do so for the purposes of justice. And in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength."

West Virginia does not and could not successfully here contest the principles thus laid down, but the principles of equity and the rules of

chancery procedure so far as *essential* to protect the rights of parties litigating in this tribunal will, of course, be substantially enforced. The application of some of the rules of procedure are certainly *essential* to substantial justice. Mr. Bates, in his work on Federal Equity Procedure (Vol. II., p. 802), says (section 753):

"Before a cause is referred to a master to take and state an account between the parties, the following preliminary steps should be taken, as conditions precedent to the reference, viz: (1) The pleadings should be perfected and the cause put at issue; (2) the parties should take the proofs upon the issues made by the pleadings, as fully as the nature of the case will allow; (3) the cause should be regularly set down for hearing; (4) the cause should be regularly heard upon the pleadings and the evidence by the court; (5) *upon such hearing the court should pass upon all the issues made by the pleadings, and should enter an interlocutory decree declaring the rights of the parties, and also settling and declaring the principles upon which the account is to be taken*; (6) the decree should refer the cause to a master to take and state the account in accordance therewith and report to the court, and all other matters should be reserved until the coming in of the report. * * *"

While the foregoing quotation refers to the equity practice which obtains in the *Circuit and District Courts* of the United States, so far as the practice is based upon substantial justice and is necessary for the protection of the rights of parties litigant, we suppose it will be pursued by this Court in the exercise of its *original* jurisdiction. If there were two bases of accounting in this case, both equally open to adoption by the Court, the objection of West Virginia to paragraph II. of the decree proposed by the complainant, would be perhaps without force, but from our standpoint, it is conclusively apparent that there is but one basis upon which an accounting in this case for West Virginia's Equitable proportion of the Virginia debt can be decreed. The bill alleges, in paragraph VI., that on the 20th day of August, 1861,

"The Restored State of Virginia in convention assembled in the City of Wheeling, Virginia adopted an ordinance to 'provide for the formation of a new State out of portion of the territory of this State,' section 9 of which ordinance was as follows, to wit: '9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the 1st day of January, 1861, to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted,

and deducting therefrom the moneys paid into the treasury of the Commonwealth from the Counties included within said new State during such period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.'"

The bill also alleges, paragraph VII., that:

"On the 31st day of December, 1862, an Act was passed by the 37th Congress of the United States providing that the new State thus formed in pursuance of the ordinance of the Wheeling convention above referred to, should, upon certain conditions, be admitted into the Union by the name of West Virginia with a constitution which had theretofore been adopted for the new State by the people thereof, such conditions being that a change should be made in the proposed Constitution with regard to the liberation of slaves therein."

Also that it was provided by the Act of Congress that whenever the President should issue a proclamation stating that such change had been made and ratified, the Act admitting such new State should be effective sixty days after the date of such proclamation.

The bill also alleges that a proclamation was issued by President Lincoln on April 20th, 1863, and that West Virginia in conformity therewith, and by the operation of said Act of Congress, was admitted into the Union as a State on the 20th day of June, 1863.

The bill also alleges, in paragraph X. *inter alia*, that

"By section 8 of Article VIII. of the Constitution of West Virginia it is provided:

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the First day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years.'"

The bill in paragraph XVIII. alleges the second of four grounds upon which the liability of West Virginia in this suit is asserted, as follows:

"II. The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia as it existed prior to the creation and erection of the State of West Virginia, *forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in*

which the method of ascertaining her liability on account of said debt is prescribed, and this liability is embedded in the Constitution under which she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union."

This is rhetorical, but it is none the less accurate and true.

The answer admits (paragraph VI.) the allegations of the bill as to the adoption and terms of the ordinance, including Section 9. It also admits the allegations of the bill averring the assumption of a liability and making provision for its ascertainment and payment by the constitutional provision quoted in the bill.

Paragraph XVIII. of the answer is as follows:

"This respondent for further answer to said bill says: that she denies that the alleged liability of the State of Virginia for a just and equitable proportion of the public debt of the Commonwealth of Virginia rests upon any ground specified in Paragraph XVIII. of said bill except the second, upon which, as hereinbefore averred in this answer, the State of West Virginia has always been ready and willing and is now ready and willing to adjust her liability."

Thus it stands *alleged in the bill and admitted by the answer*, and if it were not admitted by the answer, it is *conclusively established by the bill and its exhibits*, that there was a solemn agreement entered into in 1861 between the State of Virginia and the new State of West Virginia, with the consent of the Congress, by which the latter State assumed (as one of the conditions of the assent of Virginia to her becoming a State) a just proportion of the indebtedness of that Commonwealth as it existed prior to January 1st, 1861, *the manner of ascertaining which proportion was defined by the ordinance itself.*

The ordinance was, as treated by this Court in the case of Virginia vs. West Virginia (11 Wallace, 39), a *proposition* by the Commonwealth of Virginia to the people of the proposed new State. It was accepted by the constitutional convention of the proposed new State, carried into its Constitution and adopted by the people; and when the State was admitted into the Union by the Congress, with the assent of Virginia, *it became a completed compact between competent parties, upon adequate consideration, protected by the Constitution of the United States from impairment by either party.*

We say the ordinance defines what would be a just proportion. This is an accurate statement; for the ordinance provided not only for the assumption of a just proportion, but provided *specifically in what manner that proportion shall be ascertained.* We do not understand

the suggestion which appears to have been made at the argument, that the continued obligation of the compact depends upon the *continued assent to it by both States*. A compact between States, entered into with the consent of Congress, has always been treated by this Court as irrevocable by *either* of the parties, and where the legislation of either has attempted to impair the obligation of a compact, it has been held void under the Constitution of the United States (See *Greene vs. Biddle*, 8th Wheaton, 1).

The obligation of a lawful compact between two States, justiciable in its nature, certainly is as binding in law upon *both* until abrogated by *both* in a constitutional way, as a contract between a State and an individual, or between two individuals, and a disregard or violation of it by one, certainly cannot thereby release it from its obligation.

It is difficult to understand how, from the averments of the bill and the admissions in the answer, and the argument at the Bar, it can be an *open question in this case* that the only liability of West Virginia for an Equitable proportion of the *ante-bellum* debt of Virginia is upon the basis of the ordinance.

The bill, in paragraph XVIII, summing up the grounds upon which it rests the liability of Virginia to account, says:

"FIRST. The area of the territory now known as the State of West Virginia, formed about one-third of the territory of the Commonwealth of Virginia when this public debt was created, and its population included about one-third of that of the original state at the time of its dismemberment, and the State of West Virginia *by the acquisition and appropriation of said territory*, with the population thereof, *assumed therewith liability for a just and equitable portion of the public debt created prior to the partition of said territory.*"

This is followed by the second ground, hereinbefore quoted, which is based upon the ordinance and Section 8 of the Constitution.

The third ground is as follows:

"The State of West Virginia has further by repeated enactments and joint resolutions of her legislature recognized her liability for a just proportion of this debt."

The first ground invokes the application of what is assumed to be the rule of *international* law that "debt follows territory," and that the debt as between West Virginia and Virginia is to be "ratably apportioned" on the basis of *population* and *territory* at the time of the separation.

In support of this theory of liability, which is absolutely incompatible with the theory of liability based upon the compact, one of the

learned counsel for the complainant read, on the argument from the opinion of Mr. Justice FIELD, who wrote for the court in *Hartman vs. Greenhow* (102 U. S., 672) this sentence:

"Where a state is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them."

counsel added, "That is in *Hartman vs. Greenhow*."

• JUSTICE HARLAN: "Please read that again."

Mr. CONRAD: "Where a state is divided into two or more states in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them."

Counsel added: "That is an opinion of this court that has received no dissent."

With the greatest veneration for the learning and just fame of Mr. Justice FIELD as a jurist, we venture the observation that the subject was not at all involved in the case. The question there was solely as to the *receivability of coupons*, of bonds representing the funded debt of Virginia, *for taxes*. West Virginia was not a party; nor was Virginia. But aside from this the quotation read from Mr. Justice FIELD did not in the slightest degree correctly put before the Court the view which he must be deemed to have entertained. We supply the deficiency, quoting all that he said:

"Writers on public law speak of the principle as well established that, where a State is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them. On this subject Kent says: 'If a State should be divided in respect of territory, its rights and obligations are not impaired; and, if they have not been apportioned by special agreement, their rights are to be enjoyed and their obligations fulfilled by all the parties in common' (1 Com., 26); and Halleck, speaking of a State divided into two or more distinct and independent sovereignties, says: 'In that case, the obligations which have accrued to the whole before the division are, *unless they have been the subject of a special agreement*, ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of courts, and the practice of nations.' (International Law, c. 3, Sect. 27.)"

Mr. Justice FIELD continues:

"In conformity with the doctrine thus stated by Halleck, both States—Virginia and West Virginia—have recognized in their constitution their respective liability for an equitable

proportion of the old debt of the state, and have provided that measures should be taken for its settlement."

It is apparent that Mr. Justice FIELD, in the clause last above quoted, referred to the *special* agreement evidenced by Section 9 of the Ordinance and to the first clause of Section 8 of Article VIII. of the West Virginia Constitution.

It is worth noting that, in *Antoni vs. Greenhow* (107 U. S., 769), which also involved the same Funding Act, Mr. Justice FIELD, in his dissenting opinion, in which Mr. Justice HARLAN concurred, said, referring to the same subject:

"It is a well-settled doctrine of public law that, upon the division of a state into two or more states, the debt shall be ratably apportioned among them (*See authorities upon this subject in Hartman vs. Greenhow* (102 U. S., 672, 677)."

Phillimore, after quoting both Grotius and Kent, says:

"If a nation be divided into various distinct societies, the obligations which had accrued to the whole before the division are, *unless they have been the subject of special agreement*, ratably binding upon the different parts";

and Sir Sherston Baker in "First Steps of International Law," page 36, says:

"The case is slightly different where one state is divided into two or three distinct and independent sovereignties. In that case the obligations which had accrued to the whole before the division are (*unless they have been the subject of a special agreement*) ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of courts and the practice of nations. It is incorporated into the treaty by which the modern Kingdom of Belgium was established."

Thus it will be seen that the general rule as quoted from Mr. Justice FIELD, is *essentially qualified* by the authorities which he quotes, in this, that a *special agreement* between the two states in respect of the assumption of a proportion of the debt as it existed before the separation, *takes the case out of the general rule*; so that the second ground alleged in the bill, which specifically avers a *special agreement*, *destroys the applicability of the rule to this case*. Upon what theory is this special agreement, consisting of a proposition by Virginia, its acceptance by the constitutional convention, its embodiment in the Constitution, the ratification of the latter by the people, and the admission of the State into the

Union by Congress, to be so cavalierly dismissed from this case as the decree proposed on behalf of Virginia would do? This Court had occasion to consider the validity of this ordinance in the case of *Virginia vs. West Virginia*, 11 Wallace, 39, in respect of the provision contained in it for the incorporation of the counties of Berkeley and Jefferson in the latter State conditioned upon a popular vote therefor; and the Court said:

“There was then a valid agrément between the two states consented to by Congress, which agreement made the accession of these counties dependent on the result of a popular vote in favor of that proposition.”

If the ordinance was valid *then* in respect of the incorporation of the two counties, upon what theory can it be held to be invalid as to the specific provision contained in Section 9 for the assumption by the new State of a just proportion of the indebtedness *to be ascertained in the manner defined*, clearly carried into the Constitution of the new State and assented to by Congress by the admission of West Virginia into the Union? It does not impeach or even belittle the “Restored State of Virginia” or the validity of its acts to refer to it as a “revolutionary government” or to the ordinance as a “revolutionary proceeding.” Whether it was or was not the lawful government of Virginia was a political question. When the House of Representatives admitted the members of Congress from that State and the Senate admitted the senators elected by the legislature of the “Restored State,” and the President recognized that government as the true government of Virginia, that forever settled its legality and regularity beyond the power of judicial review and made valid its acts *ab initio*. But for that “Restored State of Virginia,” and its recognition by the political departments of the Federal Government, there would have been no government of Virginia *under the Constitution* of the United States from April, 1861, to the close of the war. The ordinance of the Wheeling convention of '61, which was the genesis of the State of West Virginia, and the adoption of its Constitution, are, from the standpoint of law, as clearly acts of the Commonwealth of Virginia as if they had taken place in 1851 instead of in 1861.

The suggestion so often made in oral and printed argument that West Virginia is the “daughter of Virginia,” is sentimental, but inaccurate. When admitted into the Union she came in on an equality with the original states and became a member of the

sisterhood of states, equal in sovereignty and personality to the older commonwealth of which her territory had once been a part, and of which her people had once been citizens.

May it not be that this misconception of the real relation of West Virginia as a State of the Union to old Virginia has played an unconscious part in the disregard by the latter of the special agreement which has operated to delay an adjustment under its provisions? If this special agreement in respect of the proportion of the debt of Virginia which was to be assumed by the State of West Virginia constituted a valid compact between the two states, when did it cease to be valid, and for what reason, at the suit of Virginia, is it to be ignored? It was said, by Mr. Justice BALDWIN, in *Rhode Island vs. Massachusetts* (12 Peters, 748), speaking for the Court:

"In *Pocle vs. Fleegeer*, this Court declared that an agreement between States, consented to by Congress, bound the citizens of each State."

Greene vs. Biddle, *supra*, involved the validity of the compact between Virginia and Kentucky, entered into at the time she separated from the former and was admitted into the Union as a State, and the compact in that case in respect of the assent of Congress to it, is not unlike the compact in the present case. The Court said:

"The compact was entered into between Virginia and the people of Kentucky, upon the express condition that the general government should, prior to a certain day, assent to the erection of the District of Kentucky into an independent State, and agree, that the proposed State should immediately, after a certain day, or at some convenient time future thereto, be admitted into the federal Union. On the 28th of July, 1790, the convention of that District assembled under the provisions of the law of Virginia, and declared its assent to the terms and conditions prescribed by the proposed compact; and that the same was accepted as a solemn compact, and that the said District should become a separate State on the 1st of June, 1792. These resolutions, accompanied by a memorial from the convention, being communicated by the President of the United States to Congress, a report was made by a committee, to whom the subject was referred, setting forth the agreement of Virginia, that Kentucky should be erected into a State, upon certain terms and conditions, and the acceptance by Kentucky upon the terms and conditions so prescribed; and, on the 4th of February, 1791, Congress passed an

act, which, after referring to the compact, and the acceptance of it by Kentucky declares the consent of that body to the erecting of the said District into a separate and independent State, upon a certain day, and receiving her into the Union.

"Now, it is perfectly clear, that, although Congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent State, without the assent of Virginia, or upon terms variant from those which Virginia had prescribed. But Congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed, by a solemn act, the consent of that body to the separation. The terms and conditions, then, on which alone the separation could take place, or the act of Congress become a valid one, were necessarily assented to; not by mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this, is to deny the validity of the act of Congress, without which, Kentucky could not have become an independent State, and then it would follow, that she is at this moment a part of the State of Virginia, and all her laws are acts of usurpation."

It was held that the act passed by the Legislature of Kentucky in violation of the compact was void.

The suggestion that Virginia never assented to the compact with West Virginia because of the amendment which Congress proposed to the Constitution, is without weight.

The conditions imposed by Virginia upon West Virginia were embodied in the Ordinance. It may be admitted that any amendment proposed by Congress which would vary the terms of the *Ordinance* might have been operative to destroy the consent of Virginia to the erection of a new State out of her territory, but her General Assembly was content with the Constitution as not being in violation of the ordinance, and the amendment proposed by Congress to the Constitution, relative to slavery, was a matter with which Virginia could have no concern, it being purely local to the State of West Virginia, as affecting the status of property and persons within her borders and under her sovereignty. It sustained no relation whatever to the Ordinance or to the conditions upon which Virginia had given her assent. It is almost an evidence of desperation that, at this day, it should be solemnly argued in this Forum in behalf of Virginia that West Virginia did not become a State with the assent of Virginia, because Con-

gress decided, in response to representations from West Virginia, to require, as a condition of admission, an amendment to the Constitution providing for the gradual extinction, within her borders, of slave ownership.

We have asserted that the Ordinance was carried into the Constitution. The provision is as follows:

“ARTICLE VIII, Section 8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and to redeem the principal within thirty-four years.”

It will be noted that this language of assumption is the language of the ordinance except that the word “equitable” is used in the Constitution, while the word “just” is used in the ordinance. As a qualifying word, used in such a connection, “equitable” and “just” are synonymous. An equitable proportion could not be other than a “just” proportion, and a just proportion would be an “equitable” proportion. The ordinance and the Constitution are the constating instruments upon which the State was erected and they are to be read *in pari materia*, and it is not susceptible of doubt that the word “ascertain” as used in Section 8 of the Constitution is an adaptation of the word “ascertained” in section 9 of the Ordinance. It will be remembered that this convention assembled within ninety days after the adoption of the Ordinance. Its sole warrant for assembling was the ordinance. Its authority to frame the Constitution was derived from the ordinance. The ordinance as a whole was a proposition to that Convention and, as a whole, was accepted by the Convention. The Convention complied with all the provisions of the Ordinance. The Constitution was framed to meet all the requirements of the Ordinance. It was the basis of the Constitution.

It is difficult to consider with equanimity, the studied and inconsistent attempt to eliminate the Ordinance from the case. This is apparently the present posture of counsel for Virginia. If section 8 of the Constitution is not read in connection with the Ordinance, and, therefore, as an assumption of an equitable proportion of the debt to be ascertained as provided in the Ordinance, the Ordinance is eliminated, and section 8 of the first Constitution

is to be construed as the assumption by the new State of an equitable proportion of the public indebtedness of Virginia prior to January 1st, 1861, upon the basis of *population and territory*. It is inconceivable that such can be the law of this case. The assembling of the Convention was an acceptance of Section 9 of the Ordinance. The Ordinance embodied the conditions, and section 9 by no means the least important of them, of Virginia's consent to the erection of the new State out of her territory.

If the Convention had failed to comply, *in the Constitution*, with the *requirements of the Ordinance*, or had departed in any way from the conditions of Virginia's assent, as stated in the Ordinance, its work would have been nugatory. It was bound by the ordinance to carry into the Constitution the assumption by the new State of an equitable proportion of the indebtedness of Virginia prior to January 1st, 1861, to be ascertained as provided in the Ordinance.

It could no more disregard the terms of Section 9 than it could the other conditions of the ordinance. It was for Virginia to fix the terms of her consent. It was not for the convention to depart therefrom. It could only accept or reject. If it rejected it, it must have adjourned. Its work would have been done. Although we take it that nothing is finally decided in this case except the question of jurisdiction, we note that the court was impressed, as shown by the opinion of the Chief Justice with the relation of the ordinance to the Constitution. In the opinion it is said:

"Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it follows that what was meant by the expression 'that the legislature shall ascertain' was that the legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed and provide for the liquidation of the amount so ascertained."

The attempt to dislocate the first clause of section 8 of Article VIII of the Constitution of West Virginia "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State" from section 9 of the Ordinance, is subversive of fundamental principles of Constitutional construction and is indefensible from every standpoint of law or equity. It is beyond all reason to suppose that the plain language of the first clause of Article VIII, general in its terms, was anything more or less than an acceptance

of the proposition theretofore specifically made in section 9 of the Ordinance in order that the first clause of section 8 and section 9, would together make plain the compact.

The suggestion that section 8 of Article VIII of the Constitution had no reference to section 9 of the Ordinance, assumes that the new State was taking upon herself an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, without definition or understanding as to the basis upon which it was to be ascertained, therefore leaving open the vital question as to what would constitute an equitable proportion, for future adjustment between the two states. This is not to be believed.

The debt of the Commonwealth of Virginia on January 1st, 1861, was doubtless well known throughout the State of Virginia. It was a matter of public record and reduced to a certainty. It is alleged in the bill that about \$33,000,000 of it were incurred in connection with the construction of works of internal improvement—an enormous sum “in those days.” If it had been the purpose of Virginia, in requiring as a condition of her assent, the assumption by the proposed new state of an equitable proportion of the public debt without specification as to the manner in which, and the basis upon which that proportion should be ascertained, it is inconceivable that the language of section 9 of the Ordinance would have been what it was, and that the language of section 8 of Article VIII of the Constitution would have been what it was. It was entirely for Virginia to dictate the terms, and if it had been her purpose to require an assumption of the debt upon the basis of territory and population, West Virginia would have been required to assume “one-third of the debt as it existed prior to the first day of January, 1861,” or “an equitable proportion to be ascertained upon the basis of territory and population.” If she had so provided in Section 9 of the Ordinance, the first clause of Section 8 of Article VIII of the Constitution would have *adequately assumed liability upon that basis*. But no such proposition was made to her. No such condition of assent to her statehood was imposed upon her and there is no reason to believe that in her then condition in respect of financial ability, her people would have been willing to enter upon the status of statehood burdened with \$11,000,000, or thereabouts, of the indebtedness of the old state. At all events, she was neither called

upon nor given an opportunity to decide whether she would accept statehood upon such a condition.

If section 9 of the Ordinance had provided "The new state shall take upon herself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained upon the basis of territory and population" or "The new state shall take upon herself one-third of the public debt of the Commonwealth of Virginia prior to January 1st, 1861, would West Virginia be heard here for a moment to contend that the Ordinance was no part or basis of the Constitutional provision and that the court is at liberty to adopt some other basis than that agreed upon by the parties? It would not tax the ability of the distinguished counsel on the other side, to demolish such a proposition. And section 9, as it was written, defining the basis upon which the new state should take upon herself an assumption of a just proportion of the public debt as completely forecloses the question of basis as would have been the case had the language of the Ordinance been as we have suggested.

To rub out section 9 of the ordinance and put upon West Virginia, liability for one-third of the debt of the Commonwealth of Virginia, as it existed prior to January 1st, 1861, upon the theory that this was what she assumed by section 8 of Article VIII of the Constitution, is a proposition as unjust as it is untenable. Indeed, if the opposite theory were adopted no testimony need be taken except to ascertain the amount of the public debt of Virginia on the first day of January, 1861, and the proportion of population and territory of the new state to that of the Commonwealth of Virginia at the time of the separation. If the Ordinance were eliminated it follows that the assumption of an equitable proportion of the debt by section 8 of Article VIII of the Constitution of West Virginia was purely voluntary and not in any sense a condition of the assent of Virginia to the admission of West Virginia as a state into the Union. This is contrary to repeated allegations of the bill and against the truth as disclosed everywhere in the record. If section 9 of the Ordinance were eliminated, it is a grave question whether, but for an assumption of liability by section 8 of Article VIII of the Constitution, West Virginia would have been legally liable at all, upon principles of international law, for a dollar of that debt (See Hall on International Law, sec. 27, p. 78, and especially note on p. 80).

An effort is argumentatively made in the bill and was repeated

at the bar, and it seems to have somewhat impressed the court, to make it appear that Sections 5 and 7 of Article 8 are a recognition, not only of the liability to assume a portion of the indebtedness of Virginia, but as a recognition of liability to Virginia for grants of land and money made by the Acts of February 3 and 4, 1863.

Although not especially material, with great deference, we are unable to agree to this construction. Section 5 of Article 8 provides:

"5. No *debt* shall be contracted by this state except to meet casual deficits in the revenue, to redeem a *previous liability* of the state, to suppress insurrection, repel invasion or defend the state in time of war."

And Section 7 of the same article provides:

"7. The legislature may *at any time* direct a sale of the stocks owned by the state, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the *public debt* and hereafter the state shall not become a stockholder in any bank."

We do not see that the words "a previous liability," in Section 5, and the words "public debt," in Section 7, can be construed, all things considered, as referring to *any liability* of the new state to Virginia. Both Sections 5 and 7 were manifestly intended to be permanent provisions of the Constitution. They would have been properly included in the Constitution if Virginia, at the time of separation, had owed not a dollar of debt. Section 5, in our view, was intended to express the policy of the state as to indebtedness. The word "debt" is used here in contradistinction from the word "liability." A debt is a liability, but a liability is not necessarily a debt, and where they are *both used in the same clause*, as above, they are not to be construed as synonymous. The phrase "a previous liability" is altogether indefinite, and has no regard to the time at which it is incurred, except that it must have been incurred *prior* to the *contracting of a debt* with which to redeem it. The provision will apply to any liability incurred during the history of the state, which *thereafter* must be provided for by the contracting of a debt. It was the evident policy of the Constitution that West Virginia should "pay her way" except as therein otherwise indicated. If it is uncertain whether anything will be demandable by virtue of the contract, it cannot be called a debt. "Debt," as used here, we think, means a certain sum of money due upon an express agreement.

Hagar vs. Reclamation District, 111 U. S., 701.

The theory of the constitutional provision was, we submit, that the state should rely upon taxation and current revenues to carry on its operations, and was to prohibit the contracting of debts (borrowing of money), evidenced by bonds or otherwise, except to meet casual deficits in revenue, etc., *which would involve a previous liability*. In other words, that money should not be borrowed, *save as excepted, in anticipation of liabilities*. The words, "public debt" in Section 7 are not to be construed as having any reference to unliquidated demands. It will not be pretended that until an accounting West Virginia owes a "debt" to Virginia. She has assumed a liability which may or may not ripen into a debt, only to be determined by a judicial accounting or by voluntary adjustment.

Section 7 was likewise a permanent provision of the Constitution. To say otherwise is to assume that there was not to be any "public debt" *except* the debt to be contracted under the ordinance when its amount shall be ascertained. This assumption is untenable, for Section 5 authorizes the state to borrow money to meet casual deficits in the revenue, to redeem a previous liability of the state, to suppress insurrection, repel invasion or defend the state in time of war. Very conclusive evidence that this is the true construction of these provisions is to be found in the fact that in the new constitution of West Virginia adopted in the year 1872 from which was *omitted* Article 8 of Section 8 which was in the Constitution of 1861, is found this provision.

(Sec. 4, Article 10):

"No debt shall be contracted by the state except to meet casual deficits in the revenue, to *redeem a previous liability* of the state, to suppress insurrection, repel invasion or defend the state in time of war, but the payment of any liability other than that for the ordinary expenses of the state shall be equally distributed over a period of at least twenty years."

Strongly supporting the view which we urge is the fact that in the Constitution of *Virginia of 1867-8*, Article X, section 7, is found this provision:

"No debt shall be contracted by this State except to meet casual deficits in the revenue, to *redeem a previous liability* of the State, to suppress insurrection, repel invasion or defend the State in time of war."

This seems to have been rather a customary permanent Constitutional provision in that region.

But a better reason, why sections 5 and 7 of Article VIII of the West Virginia Constitution should not be construed as having any reference whatever to any liability of West Virginia to the Commonwealth of Virginia is that by section 8 of the same Article, it was provided:

"An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year 1861, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

This is a provision not susceptible to misconstruction in respect to the subject to which it refers. Its language is not general. It is in its nature a temporary provision. It deals with but one thing and that is the assumption by West Virginia of a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, with a provision for its ascertainment and liquidation.

It is hardly to be supposed that three distinct sections of Article VIII, two of them general and permanent and one specific and self-executing so far as the assumption of the indebtedness was concerned, were deemed necessary in order to carry into the constitution the provision of section 9 of the Ordinance. The omission of the clause in the next Constitution was very natural and no-wise sinister. It would have been absurd to readopt it in the Constitution. The liability had been solemnly assumed, and once assumed in the Constitution, it was an acceptance of the proposition of the Ordinance and, with the assent of Congress, by her admission into the Union became an irrevocable compact between West Virginia and Virginia. It is as valid today as it was when it was made. It could not be subtracted from by omission to repeat it in every new or revised Constitution, nor could it be added to by frequent repetition. Any act passed by the Legislature of West Virginia or any subsequent Constitutional provision attempting to repeal this assumption of liability would be void under the Constitution of the United States; and it is as binding upon *Virginia*, who was a party to it, as it is on *West Virginia*.

But under Section 5 of Article VIII it is perfectly clear that

when the proportion of the public debt of Virginia prior to the 1st day of January, 1861, to be borne by West Virginia under the ordinance and the constitutional provision shall have been ascertained, as provided by the former, a "debt" may lawfully be contracted by the State to redeem it, upon such terms as the legislature may prescribe. The question is: Was the ordinance binding and is it still binding?

If it be valid and binding, it is impossible for us to discover any ground upon which it can be disregarded by the Court, for if it is binding upon the states, it is binding upon the Court. True, West Virginia could not by any suit prevent Virginia from disregarding it in the adjustment with her creditors of her debt or any portion of it. But when Virginia invokes the original jurisdiction of this Court in a suit against West Virginia to compel her to account for an equitable proportion of her debt prior to January 1, 1861, upon the basis of the ordinance *and upon other and different bases*, she may plead the ordinance as the only basis upon which the Court can decree an accounting by her. The Court will not make a new contract for the parties. They were competent to make one for themselves, and they did make one for themselves. It is unfortunate that the two states were unable many years ago to adjust the matter in accordance with the agreement which they had entered into and which subsist between them. Without asserting that the fault for delay rests solely with either, we have a right to say on the record that it does not lie in the mouth of Virginia to impute much, if any, of the fault for delay to West Virginia. The records of this Court show that in December, 1866, Virginia instituted a suit in equity in this Court against the State of West Virginia to test the question whether the Counties of Berkeley and Jefferson were or were not a part of the territory of West Virginia. The cause was not determined until the 6th day of March, 1871, upon which day it was decided in favor of West Virginia, and until it was settled, obviously there could be no accounting under the ordinance, for the boundaries of West Virginia depended upon the decision, and until it was determined what Counties were a part of West Virginia, the basis for accounting under the provisions of the ordinance was wanting.

This Court takes judicial notice of the general laws and constitutions of the states. The Constitutional Convention which assembled at Alexandria on the 11th day of April, 1864, framed

and adopted a constitution, it not being submitted to the people for ratification. Section 27 was as follows:

"The General Assembly shall provide by law for adjusting with the State of West Virginia the proportion of the public debt proper to be borne by the States of Virginia and West Virginia, respectively, and may authorize, in conjunction with the State of West Virginia, the sale of all lands and property of every description, including all stocks and other interests owned and held by the State of Virginia in banks, works of internal improvement, and other companies, at the time of the formation of the State of West Virginia, *and no ordinance passed by the Convention which assembled at Wheeling on the 11th day of June, 1861, adjusting the public debt between Virginia and West Virginia shall be binding upon this State.* It shall provide for the payment of any debt or obligation created in the name of the State of Virginia by the usurping and pretended authorities at Richmond, and shall not allow any County, City or corporation to levy or collect any taxes for the payment of any debt created for the purpose of effecting any rebellion against the State or the United States. The legislature shall not provide for the payment of any bonds now held by rebels in arms against the State or United States Government."

This convention was provided for by the General Assembly of Virginia of 1863. Relatively few delegates were elected for the districts were mostly within the Confederate lines. The Constitution was adopted by the convention but was not required, nor was it submitted to a vote of the people. Under this Constitution the government of Virginia was conducted until it was superseded by another Constitution adopted some years later. We apprehend that no lawyer would contend that this attempted repudiation of section 9 of the ordinance of the Wheeling Convention, embodied in the Constitution of Virginia, adopted in convention *after the State of West Virginia had been for over a year in the Union*, was of the slightest validity. Nevertheless, it showed bad faith and doubtless had a tendency to prevent an energetic effort by West Virginia for the ascertainment of the liability under the ordinance with that government.

The Court will find appended to the bill as an exhibit the argument of Mr. Randolph Harrison, representing the Virginia Debt Commission, before the Joint Committee on Finance of the West Virginia Legislature, February 1, 1905, in relation to West Virginia's contributive share of the debt of Virginia, an unusual doc-

ument to be found in such a relation, but certainly the complainant is not in position to impeach its accuracy, for it is made a part of its bill. In that argument Mr. Harrison says:

"In February, 1870, Virginia sent delegates to Wheeling, West Virginia, then the capital of the State, for the purpose of inviting the Governor and the legislature of West Virginia to unite with her in making a statement in settlement of this account, but the Governor of West Virginia did not think the time opportune to deal with the subject, because the suit between the two states involving the counties of Jefferson and Berkeley had not then been decided. *Soon thereafter the Governor of West Virginia sent Commissioners to Virginia with authority to state the account, but at that time Governor Walker of Virginia, did not feel that he had authority to appoint commissioners, because the legislature of Virginia had in the meantime passed an act to submit the question to arbitration, and so nothing came of this effort to settle the controversy.*"

It cannot therefore upon the basis of the Bill be truthfully said here that West Virginia was in the beginning laggard in respect of attempting to adjust on the basis of the ordinance the burden which she had assumed by her acceptance of it. She could not do it without the co-operation of Virginia.

Then came the enactment, on March 30, 1871, by the General Assembly of Virginia of the first funding bill, approved March 30, 1871, (Exhibit No. 1 of the bill). By this act Virginia *herself* undertook to "apportion," without consulting West Virginia, the debt between *herself and West Virginia* upon the assumed international law basis, and adjusted it upon the basis that Virginia's share of the debt was two-thirds, and *West Virginia's share was one-third*; which act provided for the issue of several million dollars of what were known in the market as "West Virginia certificates" for one-third of the debt. This was in utter disregard of the compact. If she had settled with her creditors on the basis of two-thirds, and left open the ascertainment, on the basis of the ordinance, of West Virginia's share, without issuing the "West Virginia certificates," it would have been simply her affair. But the preamble to this act challenges attention. It is as follows:

"WHEREAS, in the formation of the State of West Virginia there were included within its boundaries about one-third of the territory and population of the State of Virginia; and

"WHEREAS, in the ordinance authorizing the organization of such state it was provided that the said State shall take

upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this State, and will continue to be made as long as may be necessary; and

“WHEREAS, the people of this Commonwealth are anxious for the prompt liquidation of *her portion of said debt*, which is estimated to be two-thirds of the same; and

“WHEREAS, it has been suggested that the authorities of West Virginia may prefer to pay that *State's portion of said debt* to the holders thereof, and not to this State, as the Constitution of this State provides;

“NOW, THEREFORE, to enable the State of West Virginia to settle *her proportion* of said debt with the holders thereof and to prevent any complications or difficulties which might be interposed to any other matter of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her portion of said debt as the same shall become due therefor;

“1. Be it enacted by the General Assembly of Virginia,” etc.

Here, the Court will observe, is a distinct reference in the second clause of the preamble of the first funding act, to the *Wheeling ordinance*, under which West Virginia was to take upon herself the just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, with the declaration that it had not yet been fulfilled, although repeated and earnest efforts in that behalf had been made by this State, “and will continue to be made as long as may be necessary.” This ordinance is made the basis of her funding legislation.

How strange it seems that in this legislation asserting the liability of West Virginia to be based upon section 9 of the ordinance, and declaring that it would be continuously insisted upon, its terms, brief as they were, should have been garbled, and that the legislature should have proceeded to ignore it. But the reference to section 9 of the ordinance in the preamble was operative in law to incorporate it *all*, and to put upon notice of its terms as measuring the liability assumed by West Virginia thereunder, every person who accepted a bond or a certificate issued under that act and under the subsequent acts.

In the act of 1879, approved March 28, 1879, Exhibit No. 2 of the bill, it was provided by section 7:

"The owners of all classes of bonds mentioned in this act who shall exchange their securities for the bonds created under this act, and who shall not have yet received certificates representing the *remaining one-third of their principal and interest due and payable by the State of West Virginia*, shall receive certificates of a like character to those issued under the act of March 30, 1871, when they made such exchange, etc."

In the act of February, 1882, Exhibit 3 of the bill, it is provided:

"6. For all *balances* of such indebtedness constituting *West Virginia's share of the old debt*, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said Board for Sinking Fund Commissioners shall issue a certificate as follows:

"No. . . . The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for . . . , held by . . . , dated the . . . day of . . . , numbered . . . , leaving a balance of . . . , with interest from . . . , to be accounted for by the State of West Virginia without recourse upon this Commonwealth."

Exhibit No. 4, Chapter 325, provides for the issue of similar certificates, "to be accounted for to the holder of this certificate by the State of West Virginia."

In the act, Exhibit No. 5, Chapter 747, after reciting in the preamble the various funding acts of 1871, 1879, 1882 and 1892, occurs the following:

"WHEREAS, in each of said acts provision is made for issuing to creditors of the original State of Virginia which should accept the new bonds provided for by said several acts, certificates for such proportion of the obligations surrendered by them as was *deemed proper to be borne by the State of West Virginia*, to wit, *one-third of the amount of said obligations*, of which certificates this State holds a large amount, through the agency of the Commissioners of its Sinking Fund and Literary Fund; and

WHEREAS, the present State of Virginia has settled and adjusted to the entire satisfaction of her people and her creditors the liability assumed by her on account of two-thirds of the debt of the original State;

"Now, THEREFORE, be it resolved," etc., "that a commission of seven members is hereby created," etc., "which is known as the Debt Commission, and said Commission is hereby authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public

debt of the original State of Virginia properly to be borne by West Virginia;" concluding with this language:

"But said Commission shall in no event enter into any negotiation hereunder, *except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State, which she has already provided for as her equitable proportion thereof.*"

Thus beginning with 1871, Virginia has proceeded without regard to her compact to adjust two-thirds of the indebtedness as her own, and to issue \$18,000,000 or thereabouts, of West Virginia certificates, frequently characterized in the act as West Virginia's proportion, and several millions of them bearing on their face the statement that they are to "be accounted for to the holder of this certificate by the State of West Virginia, without recourse upon this Commonwealth," and hawked about in the markets, to the injury of the credit of West Virginia. Is the State of West Virginia much to be chided for the delay which has occurred in adjusting with Virginia this matter on the basis of the ordinance?

But there would seem to be, from the bill and the argument on behalf of Virginia in this Court, no question open here as to the validity and binding force of the compact created by the proposition in the ninth section of the Wheeling ordinance, its acceptance by the Convention of November, 1861, its incorporation in the constitution of West Virginia, its ratification by the people of the State, and the assent of Congress to it, evidenced by the admission of the State into the Union.

It was said on the argument by the learned Attorney-General of Virginia, who officially and very ably represents the Commonwealth in this cause, after outlining, at page 323, what he thinks *would have been* a fair adjustment and coming to the ordinance, as follows:

"MR. ANDERSONS In the 11th Wallace case it was established that the Wheeling government was the government of Virginia, and the effect of that decision was to uphold the validity of what is known as the Wheeling ordinance.

"Now instead of letting these questions be settled upon the principles of equity and public law, that convention prescribed this artificial and arbitrary basis of adjustment. *We have to concede that we cannot go behind this, that we must accept it.*

"Section 9 of the ordinance, giving the consent of Virginia to the formation of the new State, reads as follows:

"MR. JUSTICE HARLAN: What are you reading?

"MR. ANDERSON: From the Wheeling Ordinance quoted at page 3 of the brief of the counsel for the plaintiff. Section 9 of the ordinance reads as follows:

"9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the 1st day of January, 1861, to be ascertained by charging to it all of the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during said period."

"That is the basis upon which the consent of the Commonwealth of Virginia was given to the formation of this new State. The stipulation imposed by Virginia upon West Virginia as a condition upon which her consent was given, and which afterwards, in forming the State of West Virginia, the people of that new Commonwealth accepted and assented to, was that the new State should assume and take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, to be ascertained in the manner therein prescribed. That was a fundamental as well as a contractual provision, and it constitutes a primary obligation and lies at the very foundation of the right of West Virginia to be a State."

Nothing could be stronger than this statement nor could anything be more accurate.

It is very difficult to reconcile this explicit and conclusive statement by the chief law officer of the Commonwealth of Virginia, in respect of the binding force and effect of the ordinance, with the decree which he proposes on behalf of Virginia and the brief which he submits in its support; for this proposed decree asks the Court to ignore the ordinance, to treat the matter as being as completely open as if the ordinance had never been adopted or accepted; and to commit the case at large to a master to ascertain as an original proposition on the alleged basis of international law or any other basis he may choose to adopt, what proportion of said indebtedness and of the interest accrued thereon *should in equity be apportioned to and be now paid by the State of West Virginia.* (See *Kimberly vs. Armes*, 129 U. S., 512). West Virginia says to this:

That she thinks herself entitled to have the the question whether or not the special agreement as to what shall constitute a just proportion of the debt solemnly entered into between the two states is binding, determined at this juncture *by the Court* and that, if it be held to be a binding agreement, Virginia is entitled to no accounting with West Virginia in this suit for her equitable proportion of the debt of the Commonwealth prior to January 1, 1861, *except under the terms of that ordinance, carried into the constitution.*

True, the decree proposed by the complainant directs that the master

"III. Make and return with his report any special or alternative statements of the account between the plaintiff and the defendant in the premises *which either* may desire him to state or which *he* may deem to be desirable to present to the Court."

This asks the Court to leave the determination of the pivotal point in the case, which we think should be decided by it in advance of an accounting, to a master, albeit only in an advisory way, and it gives West Virginia permission to have an accounting made, *if she desires*, it, on the basis of the ordinance *at her own expense*. *She is defendant* here. In that event we would have two lines of investigation proceeding before the master at the same time, each entirely distinct in basic principle from the other, each burdensome in labor, expense and the consumption of time. Neither would throw any light upon the other. An exhaustive accounting under the ordinance would not aid the Court in determining whether it is *binding* and the only legal basis of settlement or not. An exhaustive investigation upon the international law basis would no more aid the Court in determining whether the ordinance is binding and therefore the sole ground upon which the liability of West Virginia to an accounting at all can be based. If the compact is in force, any accounting save under that will be not only burdensome, but superfluous. If both were made, upon what principle would the Court choose between them?

Upon general principles there must be a distinction, one would think, dealing with the general doctrine of apportionment, *in the absence of a special agreement* between a debt incurred by a state, before separation, in repelling invasion, *a debt which would be for the equal benefit of all its inhabitants*, and a debt incurred, as was the entire debt of Virginia prior to the first day of January, 1861, for *works of internal improvement*. If the proceeds of such a debt were all expended in the territory of the original state, there would seem to be no equity in requiring the new state erected out of a portion of its territory to be saddled with any portion of the debt, for the reason that the improvements for which the debt was incurred would be owned by and remain entirely within the limits of the original state. Upon the other hand, if a portion of the debt were expended in improvements within the boundaries of the newly erected state, it would seem that upon separation, as such *improvements would be local* and the old state would be deprived of her property in them and the new

state would become the proprietor and beneficiary by virtue of the separation *in the absence of a special agreement*, she should, in equity, contribute their cost or value to the payment of the debt of the original state. And this was the theory of the Ordinance.

In this case it is alleged in the bill that the larger portion of the indebtedness for internal improvements, for which the debt was incurred, were constructed within the state of Virginia, but it is alleged, generally, that several millions were expended in constructing improvements within the territory of the new state of West Virginia. All this, manifestly, must have been taken into account in the framing of the ordinance. All the local improvements which were constructed in what is now Virginia remain in Virginia, of course; and those which were construed in what is now West Virginia were fixed within her borders. It is alleged in the bill:

But it must be remembered, *first*, that these internal improvements which have been completed within the territory, now West Virginia since January 1st, 1861, have been completed without expense to Virginia, and for that she is entitled to no credit. *Second*, Obviously, the completion of such works to a connection with the railroads and other means of transit in Virginia, has enhanced the value of the improvements local to Virginia constructed with the proceeds of said debt, by increasing the business over them. The allegations of the bill, that these improvements in Virginia, which began in 1820, were mainly with a view to ameliorating the condition of the people of West Virginia, and for their benefit are not issuable allegations, but they are denied by the answer. They are easily pleaded, but they afford no basis upon which the Court can enforce a liability upon West Virginia. Whatever element of fact there is in the allegation was well known to the government of Virginia when the Wheeling ordinance was adopted, and undoubtedly entered into the proposition embodied in Section IX.

It is said in the brief for complainant by way of objection to Paragraph 2 of the decree proposed by defendant:

"That the completion of some of the main lines of improvement beyond the said range toward the Ohio River since the first of January, 1861, has increased to a very great and material extent the values of real estate, including coal and timber, in the said territory now included in West Virginia, thus carrying into effect the original scheme of improvements which could not have been had not the lines east of said range ben first constructed."

"We respectfully object to paragraph 2 of defendant's draft,

on the ground that it seems to lend the sanction of the court in advance to a basis or scheme for the statement of account, which is not shown by anything *as yet* in the cause to be either equitable or just.

"Before any such question can be fairly adjudicated, it is necessary to the ends of justice, that there shall be a mass of evidence in the case, not yet introduced, which evidence the court should have the aid of its Master in collating and thoroughly digesting."

In reply to this we have to say that *all that can be shown*, bearing upon the question whether the ordinance, and its acceptance and incorporation into the constitution with the consent of Congress, is the measure of liability assumed by West Virginia in agreement with Virginia *is already in the case*. No evidence can throw any light upon it. It raises a question of law pure and simple; evidence or aid by a Master are not necessary to its determination. The facts are not only undisputed and indisputable, but they are documentary, and are alleged in the bill and admitted by the answer. If the court is of the opinion that it is the basis agreed upon between the two states, it certainly is not for the court to determine whether the agreement *ought, or ought not, to have been made between the states*. Whether it would, from the standpoint of today, be a just or equitable basis, is beside the question, which is: Is it the basis agreed upon? It is also said:

"There is by no means enough in the record to enable the court to come to any just or definite conclusion as to the precise scheme which it would be *equitable* to adopt in stating the account.

"To do so at this stage of the litigation would be to decide an important question in the case before the evidence for a full understanding and just decision of that question is before the court. It would be largely to take a step in the dark, which might, and in all probability would, do injustice to one party or the other.

"Our *main* objection to *paragraph 2* of defendant's draft is that its effect manifestly is to have the court *prejudge* the case as to the *basis* upon which the *account shall be stated*."

All this means but one thing, and that is, that the court shall take a mass of testimony in order to enable it to determine whether or not *it will set aside the compact between the two states*. We take this to be an impossible proposition. Of course it is not possible to determine now what the result of an *accounting*, on the basis of the ordinance, will be, if such an accounting is had. The records, archives and papers bearing upon it, for the most part have been

in the continued custody of the complainant, and were not open, upon reasonable request many years ago officially preferred, by the Commissioners appointed by West Virginia authorized to state the account. It seems to be the notion of the learned counsel that the court will feel itself at liberty to enforce the ordinance as the basis of accounting, or set it aside and resort to the alleged international law basis, according as *testimony* shall be furnished as to whether it *was equitable or otherwise*. We do not understand that to be within the province of the court upon the allegations of this bill and the conceded facts in this case. It involves no pre-judgment. It is simply what occurs in such cases generally that the court will have decided where upon the pleadings and other exhibits it is able to do so, upon the *principle which shall govern the accounting*. There is no allegation in the bill that the proposition made by the restored government of Virginia, defining the just proportion of the debt to be assumed by the new state, was not advisedly made. There is no allegation of fraud or overreaching, and if there were it comes over forty years too late. It must not be forgotten that this proposition, which was accepted by West Virginia, was a proposition *made by Virginia*, and that the *acceptance* of it was a *condition* upon which *she gave her assent* to the *erection of the new state out of her territory*. It is not for her to ask the court to aid her in repudiating it. It must be borne in mind, too, that the fairness of the agreement is to be considered, if it were an open question, without reference to the condition of either party at this day but with reference solely to the condition of both in 1861 when the ordinance was adopted. Probably it is true that with the development of West Virginia, which has come about through the lapse of years, the increase of her population, the expenditure of vast sums in transportation facilities, in mining and other operations, and the general exploitation of her resources, Virginia would not be willing to make the proposition which she did make a half century ago. But when one thinks of West Virginia as she was then, with her undeveloped resources, with scant transportation facilities and population, it will be quite apparent that the agreement in her then condition was at least a fair one. If it is open to criticism at all, it is that it is unfair to West Virginia. True, Virginia has suffered; she was through four years of war a battleground; her people were largely withdrawn from their vocations of peace; her agriculture languished; her commerce was paralyzed and much of her property destroyed by contending armies. But the people of West Virginia, who adhered to the Union and helped

to rescue the government of their state and to bring it into harmony with and support of the government of the United States are neither to blame for it nor should they be compelled to pay for it. West Virginia likewise suffered from her proximity to the theatre of war. Counsel add:

"It is submitted for a decree referring it to a Master, to state and report to the court the data necessary to enable the court to justly decide it upon its merits—and all the complainant desires is an opportunity to show to the court and its Master what is the fair and equitable basis upon which the account between the two states should be stated, under all of the circumstances of the case, as they shall appear when the evidence is all in. If it should then appear that the basis prescribed by the Wheeling ordinance is binding upon the parties and must be followed as the basis upon which the account shall be made up, that basis would be accepted. But if it should be then manifest that that arbitrary basis of settlement is not the one on which the account should be stated, because it would, if applied to the facts of the case as they shall appear in the evidence, lead to absolutely unconscionable results and operate to impair the obligation of the contracts by which the common debt was created, contracts which were and are alike obligatory upon Virginia and West Virginia, or for any other valid reason, then the scheme of settlement indicated in the Wheeling ordinance would have to be discarded, and an equitable basis and scheme of settlement adopted."

This, too, is but a re-statement by counsel, in different language, of the proposition that it is for the court to take testimony through a Master, to determine what *would be a just and equitable basis* of settlement between Virginia and West Virginia, the agreed basis, or the assumed international law basis. This is plainly calling, upon the court to ignore the ordinance as a binding agreement, notwithstanding the solemn statement of the Attorney-General on the argument as to its binding force and contractual character. This, it seems to us, is impossible.

What is meant by the suggestion that the ordinance may be held to be *unconstitutional* because it *impairs* the obligation of contracts by which the common debt was created, "contracts which were and are alike obligatory upon Virginia and West Virginia," is difficult for us to understand. It is easy to see that it begs the question, for it assumes the indebtedness of Virginia prior to January 1st to be contracts which are binding alike upon Virginia and West Virginia. The personal identity or individuality of Virginia as a state which issued the bonds and owed the debt was not at all affected by the sepa-

tion of West Virginia from her and her erection into a new state. It would have been entirely competent for Virginia to have agreed with West Virginia that she would not be liable to assume any portion of the debt of Virginia as it existed prior to the first day of January, 1861. It would not have impaired the obligation of any contract, just as it was competent for the United States to enter into an agreement with Texas that she should pay her own debt, consisting of several millions of dollars, incurred before she was received into the Union.

The writers on international law are unanimous as to the validity of agreements between nations, under similar circumstances, as to the apportionment of indebtedness accrued before a separation. It is needless to again quote or cite them.

Counsel say further by way of objection to paragraph second of the decree proposed by the defendants:

"While it is believed upon the facts stated in the bill and the accompanying exhibits and upon the proofs hereafter to be adduced in support thereof that West Virginia will owe a very large sum under the arbitrary scheme of the Wheeling ordinance, we submit that we should not in the present status of that litigation be *tied down to the terms of that ordinance.*"

If it is binding upon the two states, why should not both parties be "*tied down to the terms of that ordinance?*" It will be observed by the Court that no argument is made that it is not binding and that no reason is given why it should not be binding and enforced. Indeed it is insisted upon in the Bill as an irrevocable Compact.

Counsel add:

"Indeed, its provisions were modified by the terms of the eighth section of Article VIII. to the State Constitution, under which West Virginia was made a state, which provided that West Virginia should assume an equitable proportion of the common debt of the Commonwealth, *principal and interest*, and yet the defendant's draft excludes any item of interest from the account."

Section 8 of Article VIII. of the first West Virginia constitution *did not* assume the payment of *any interest upon the debt of Virginia as it existed prior to the 1st day of January, 1861.* It is brief, we repeat it:

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, shall be assumed by this State."

The above words constitute all there is in the Constitution by way of *assumption of liability for indebtedness*. If there was unpaid interest due January 1, 1861, that would be a part of the debt of the Commonwealth of Virginia then existing, an equitable proportion of which was assumed by this constitutional provision. After assuming an equitable proportion of the debt, Article VIII. laid a command upon the legislature:

“* * * to ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years.”

This injunction for reasons which appear in the case was not observed. There was no agreement to assume an equitable proportion of the *interest on the debt which might accrue after January 1, 1861*. The Constitution shows that it was in the contemplation of its framers that the new State, confessedly sparsely settled and undeveloped, would require time for the discharge of the equitable proportion of the *debt so assumed* when it should have been *ascertained*, and it was provided that the legislature should make provision for the liquidation of the *debt so assumed*, when ascertained, by a sinking fund to pay the *interest accruing on the debt so ascertained and assumed* by West Virginia, and to pay the principal of the *debt so ascertained and assumed* within thirty-four years.

The thirty-four years have expired. The constitutional provision has been omitted. The provision as to ascertaining the indebtedness and providing for its liquidation, etc., within thirty-four years was outside of the constitutional *assumption of an equitable proportion of the debt* of the Commonwealth of Virginia, as it existed prior to January 1, 1861. It was no part of the ordinance which was carried into the Constitution, and fulfilled by the specific assumption of an equitable proportion of the debt. The ordinance had made no provision as to the tribunal by which the debt should be ascertained, nor did it contain any provisions as to its payment, after its ascertainment. The assumption of the debt was a literal acceptance and fulfillment of the requirement of Section 9 of the ordinance, to be ascertained as therein provided. If Article VIII. had stopped there, it would, so far as the obligation of West Virginia to Virginia was concerned, have been complete; it would have constituted, as it does constitute, a compact for the assumption and payment of an equitable proportion of the debt of the Commonwealth of Virginia as it existed prior to January 1st, 1861. If the requirement that the Legislature

should "ascertain" the amount and provide for its payment, principal and interest, within thirty-four years, had been carried out and bonds issued therefor, the bonds might have been delivered to Virginia for distribution among her creditors and would have borne interest; or they might have been sold by West Virginia, and the cash proceeds paid to Virginia for distribution among her creditors. Either method was open under section 8 to the legislature and so, when there shall have been an accounting under the ordinance and an ascertainment thereby of what is the equitable proportion of the debt as it existed prior to the date of January 1, 1861, assumed by West Virginia, the legislature of West Virginia is perfectly free as to the manner in which the obligation shall be discharged. It would not be obliged to issue bonds for thirty-four years, that provision of the Constitution having been omitted in the revised Constitution. *It might do so if it chose.* It might provide for the issue of bonds due in 100 years, or 20 years. It is at liberty to fix the rate of interest which the bond shall bear at 2 per cent. or 3 per cent. or 4 per cent. It could provide for the delivery of the bonds to West Virginia in discharge of her obligation to that Commonwealth, if acceptable to her, or she could borrow the money on her bonds at a low rate of interest and discharge the debt to Virginia *in money*. That would be a "debt contracted" under section 5 of the Constitution for the *redemption of a previous liability*, and in nowise a modification of or departure from the ordinance or the contract of assumption made irrevocably by the adoption of section 8 of the first Constitution. She made no covenant to pay interest upon the proportion which she assumed upon its ascertainment, until the amount should be paid to the State. But whether she should pay interest or not, is a question which is not necessary to determine at this time through a Master or otherwise. In any event, it is very difficult to see what testimony could be taken before a Master which would aid the Court in determining the *liability of the defendant to pay interest*.

Under Point III., the learned Attorney General objects to the second paragraph of the decree proposed by the defendant also upon the ground that it excludes from the account the *value of the property, assets and money which West Virginia is alleged to have received from the Commonwealth of Virginia by grants contained in the acts of February 3 and 4, 1863*. The learned Attorney General says that these acts were passed, as we understand him, "before the legislature of Virginia had in any form given its consent to its (West Virginia) creation out of the territory of Virginia." In this he is certainly in

error. It has been our understanding that the claim of Virginia, for which an accounting is sought in this case, is restricted by the court to an accounting which shall ascertain the equitable proportion of the debt of the Commonwealth of Virginia, prior to January 1, 1861; but be this as it may, the argument of the learned Attorney General is extraordinary.

It is said that upon the basis of the ordinance alone none of the property embraced by the grants contained in the acts of February 3 and 4, 1863, would have passed to the State of West Virginia; and on page 6:

"By the terms of that ordinance Virginia's title to ownership of all the property and assets theretofore belonging to the Commonwealth remained intact. By it West Virginia would acquire no title to any of these assets or of that property. Framed as that ordinance was, by West Virginians, and arbitrary on its face, unjust as were the *criteria* by which it undertook to provide that West Virginia's proportion of the common debt should be computed, its authors were not so conscienceless as to also propose that the new State, after making such an inadequate contribution to its share of a debt, which had been chiefly contracted by the votes of the representatives of its people and for their benefit, should also have a share of the property and assets of the Commonwealth free of charge.

"All that was by the terms of that ordinance to be ceded by the Commonwealth to the new State was political dominion and jurisdiction over the people and territory embraced in the new State."

To this we do not agree. There is nothing in the terms of the ordinance which affirms Virginia's title to and ownership of all the property and assets theretofore belonging to the Commonwealth of Virginia, or of any thereof located in the territory of the proposed new state. Virginia consented to the erection of West Virginia into a new State, out of her territory. She did not *grant sovereignty* to the new State. There could not be a new State without sovereignty, and when she gave her consent to the erection of the new State, it was accompanied by all the rights and powers which upon principles of international law would follow the territory and inhere in the sovereignty of the new State over the territory within her borders. The ordinance contained nothing upon the subject. The ordinance did provide—as such ordinances have always provided:

"SECTION 9. All *private* rights and interests in lands within the proposed State derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws

of the proposed State derived from the laws of Virginia prior existing in the State of Virginia. The lands within the proposed State of non-resident proprietors shall not in any case be taxed higher than the lands of residents therein. No grants of land, or land warrant issued by the proposed State, shall interfere with any warrant issued from the Land Office of Virginia prior to the 17th day of April last which shall be located on lands within the proposed State now liable thereto."

By Section 1 of the ordinance it is declared:

"The people of Virginia, by their delegates assembled in convention, *do ordain that a new State*, to be called the State of Kanawha, be formed and erected out of the territory included within the following described boundary, to wit: * * *"

And there is not a word in the ordinance in regard to what should be possessed by the new State of West Virginia, nor a *single reservation in the ordinance of assets or property of any kind to the commonwealth of Virginia*. What passed to the State of West Virginia by the separation was what would have passed had Virginia been a nation and a portion of her people had, by revolution, separated themselves from her sovereignty and formed of the people and the territory an entirely distinct and new nation called West Virginia; and what would be possessed by the new nation out of what had been possessed by the old one, would be measured entirely, *in the absence of special agreement*, by the settled principles of international law. It is needless to cite authorities. As Mr. Hall says (p. 79):

"And as the old State continues its life uninterruptedly, it possesses everything belonging to it as a person which it has not expressly lost: so that property enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continues to belong to it. *On the other hand, rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory, and demarcations of boundary, obligations contracted with reference to it alone and property which is within it and which has therefore a local character, or which, though not within it, belongs to State institutions localized there, transfer themselves to the new State person.*"

Again he says:

"Property which becomes transferred by the fact of separation consists in domains, public buildings, museums and art collections, communal lands, charitable and other endowments connected with the State, and the like."

State banks, which are State institutions and local in their nature, certainly belong to the new State created after a forcible secession. The same result would follow from an agreed dismemberment, unless the property in them were reserved. The same would be true of railroads and all proprietary interests of the old State *local to the new State*. Section 9 of the ordinance industriously safeguards all *private* rights and interests in lands within the proposed new State and their titles; but we repeat, it is silent as to *public interests* and *ownership* of the old State *located within the borders of the new*.

All that Virginia required in a financial way of the new State was that she should—

“take upon herself a just proportion of the public debt of the commonwealth of Virginia prior to the 1st day of January, 1861, by charging to the defendant all stated expense within the limits thereof and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted and deducted therefrom, the moneys paid into the treasury of the commonwealth from the counties included within the said new State during the same period.”

Expressio unius est exclusio alterius.

Possibly, these grants were made in February, 1863, mainly to afford a ground for the claim that the property which had passed by the separation should be “accounted for in the settlement hereafter to be made.” The learned counsel contends—as he is obliged to contend, we think, to give any plausibility even to his proposition—that the *statutes of February 3d and 4th, 1893*,

“together with the Wheeling ordinance, the first Constitution of West Virginia, the Act of the United States Congress, approved December 31, 1862, under which the new State was afterwards admitted into the Union, and the act of the Wheeling legislature of May 13, 1862, constitute the constating instruments and acts by which her political existence was created and her governmental powers and duties determined.”

And he adds:

“As was indicated by this court in its decision overruling the defendant’s demurrer, the Wheeling ordinance and Section 8 of Article VIII of the first Constitution of West Virginia must be taken and read together; so, also, these constating acts of February 3 and 4, 1863, and particularly of February 3, 1863, must be taken and read together with

Section 9 of the Wheeling ordinance, and with Section 5 of Article VIII of the first West Virginia Constitution, as together prescribing the terms and conditions on which the consent of the commonwealth was given to the formation of the new State out of her territory, and the transfer to that new State, when formed, of any portion of the assets and property of the parent State."

The court does say in the opinion overruling the defendant's demurrer, "Reading the Virginia ordinance and the West Virginia Constitution, in *pari materia*, it follows that what was meant by the expression that the legislature "shall ascertain" was that the legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed and provide for the liquidation of the amount so ascertained." True this was said in deciding adversely to the contention that the admission of the State under the ordinance and Section 8 of the Constitution, with the consent of Virginia, created a compact which gave to the legislature of West Virginia power of final ascertainment of the equitable proportion of the public debt of Virginia prior to January 1st, 1861, assumed, as provided in the 9th Section of the ordinance. But there can be no question of the correctness of the proposition above quoted from the opinion. We dissent altogether from the suggestion of counsel that the acts of February 3d and 4th, 1863, are to be taken and read with Section 9 of the Wheeling ordinance and with Section 8 of Article VIII, of the first West Virginia Constitution, as together prescribing the terms and conditions on which the consent of the commonwealth was given to the formation of the new State out of her territory. This proposition is entirely untenable. The Wheeling ordinance was adopted August 20th, 1861. The Constitutional Convention assembled in November, 1861, and framed the Constitution which was thereafter duly ratified by a vote of the people, which Constitution contains Section 8, assuming an equitable proportion of the debt. On the 13th of May, 1862, an act was passed by the legislature of Virginia giving the consent of that State to the formation and erection of the proposed new State within the jurisdiction and territorial limits of said State of Virginia, Section 1 of which is as follows:

"That the consent of the legislature of Virginia be and the same is hereby given to the formation and erection of the State of West Virginia within the jurisdiction of this State, to include the counties of Hancock, Brooke and Ohio (and many other counties), according to the boundaries and

under the provisions set forth in the constitution of the said State of West Virginia and the schedule thereto annexed proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

Section 3 of said act provided:

"Be it further enacted That this act shall be transmitted by the executive to the senators and representatives of this Commonwealth in Congress, together with the certified original of the said Constitution and schedules, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of West Virginia into the Union."

It ought here to be stated that the Constitutional Convention of West Virginia appointed three Commissioners to that end also that the Commissioners presented on May 31, 1862, to the United States Senate a memorial praying for the admission of that State into the Union, addressed to the Hon. B. F. Wade, Chairman of the Committee on Territories, in which they gave a history of the proceedings which led to the organization of the restored government of Virginia, and which *included at length the ordinance adopted on the 20th of August, 1861, by the Convention at Wheeling entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State," which, on the 31st day of May, 1862, was referred by the Senate to the Committee on Territories and ordered to be printed* (Congressional Globe, p. 2451; 37 Cong., 2d Session, Misc. Senate Doc. No. 99), thus *clearly demonstrating that Congress had before it not only the Constitution of West Virginia but the Wheeling ordinance in full.*

On the 31st day of *December, 1862*, an act was passed by the 37th Congress providing that the new state, thus formed in pursuance of the ordinance of the Wheeling convention above referred to, should, upon a certain condition, be admitted into the Union by the name of West Virginia, with the Constitution which had theretofore been adopted by the new State and by the people thereof; said condition being that a change should be made in the constitution of the proposed State in regard to the liberation of slaves therein. And it was provided by the act of Congress that whenever the President should issue his proclamation stating the fact that such change had been made and ratified, *thereupon the act admitting the new State into the Union should become effective 60 days after the date of such proclamation.*

The proclamation was duly issued by President Lincoln on the *20th day of April, 1863, and on the 20th day of June, 1863*. West Virginia became a state and fully organized as one of the States of the Union.

Prior to the passage, it will be observed, of the acts of February 3 and 4, 1863, the general assembly of Virginia had consented to the admission of West Virginia under the Constitution adopted by her people and had requested her admission, and Congress had admitted her under that Constitution with the single condition that a change should be made in it relative to the liberation of slaves, which was made. And we deny that it was in the power of Virginia after the action of Congress to withdraw her consent to the admission of West Virginia or to change the terms of her consent, Congress not having required as a condition of her admission any change in the ordinance adopted by the Wheeling convention or in the Constitution in anywise affecting the provisions of the ordinance.

Virginia could not thus play fast and loose with Congress in respect of her consent to the admission of West Virginia. This proposition has been sustained by this Court in *Virginia vs. West Virginia*, 11 Wallace, 29.

It cannot be supposed that after Congress had passed the law admitting the state of West Virginia into the Union upon the conditions indicated and authorizing President Lincoln to issue the proclamation announcing a compliance with the condition, that *a specific withdrawal by Virginia of her consent to the admission of the new state into the Union would have been of any force*. If this be a correct proposition, it necessarily follows that no modification of the consent theretofore given upon which Congress had acted and *after Congress had acted on the faith of her prior consent*, would be of any efficacy. The proposition of the learned counsel must have for its predicate the assumption that after Congress had passed the act for the admission of West Virginia and up to the time President Lincoln issued his proclamation declaring the condition imposed by Congress to have been complied with, the General Assembly of Virginia possessed the power to withdraw her consent or to modify it as she might see fit. If she could withdraw it, she could modify it. She could change its terms and impose other conditions. *Prior to February, 1863, West Virginia had been admitted into the Union upon a condition subsequent*. The act was complete. Congress simply suspended the taking effect

of the act until sixty days after the proclamation of the President that the condition had been complied with. The argument places the acts of February 3 and 4, 1863, upon precisely the same basis, which it is conceded that the Wheeling ordinance of August 20, 1861, and the constitution of 1861 stand. It is probable that Virginia might have withdrawn her consent to the formation of the new state at any time before the acceptance of the proposition proffered by the ordinance, by the convention which framed, adopted and submitted for ratification the constitution of 1861. That she could do it afterwards and before the action of Congress is subject to grave doubt, although it is academic, since she *did not attempt to do so*.

The counties of Berkeley and Jefferson involved in the case of *Virginia vs. West Virginia*, *supra*, were by the ordinance authorized to be incorporated in West Virginia upon the condition that a majority of the votes of the counties were cast in favor of becoming a part of West Virginia. The convention by the constitution made provision for their being incorporated. By act afterwards Virginia renewed her consent by legislation. The *vote* was not taken by the counties until after the state had been admitted into the Union and by that time and before the vote was taken Virginia had repented and had passed an act withdrawing her consent; and, to test the question whether these counties had become a part of the State of West Virginia, the suit of *Virginia vs. West Virginia* was brought in this Court. The Court said:

"Now, we have here on two different occasions the legislative proposition of Virginia that these counties might become part of West Virginia, and we have the *constitution of West Virginia agreeing to accept them* and providing for their place in the new-born state. There was one condition, however, imposed by Virginia to her parting with them and one condition made by West Virginia to her receiving them, and those conditions were the same, namely, the assent of the majority of the votes of the counties to the transfer. It seems to us that here was an agreement between the old state and the new that these counties should become part of the latter, subject to that condition alone."

Again, as to Congress having assented, the Court says:

"It is therefore an inference clear and satisfactory that Congress by that statute (referring to the act of admission) intended to consent to the admission of the state with the contingent boundaries provided for in its constitution and in the statute of Virginia; which prayed for its admission on

those terms and that in doing so it necessarily consented to the agreement of those states on that subject. There was then a valid agreement between the two states, consented to by Congress, which agreement made the accession of these counties dependent upon the result of a popular vote in favor of that proposition."

Mr. Justice DAVIS, with whom concurred Justices CLIFFORD and FIELD, dissented upon the ground, that Congress had not given its consent to the compact between the states for the transfer of Berkeley and Jefferson Counties to West Virginia until March 2, 1866, saying:

"If so, the consent came too late because the legislature of Virginia had on the 5th day of December, 1865, withdrawn its assent to the proposed cession of these two counties. This withdrawal was in ample time, as it was before the proposal of the state had become operative as a concluded compact, and the bill in my judgment shows that Virginia had sufficient reasons for recalling its proposition to part with the territory embraced within these counties. *But it is maintained in the opinion of the Court that Congress did give its consent to the transfer of these counties by Virginia to West Virginia when it admitted Virginia into the Union.*"

From this the learned justices dissented.

It is clear to our apprehension that whatever may be the opinion of the court as to the effect of the acts of February 3 and 4, 1863, it cannot be said that they had any effect whatever, qualifying or otherwise, upon the assent which Virginia gave in the ordinance and by the act of her legislature to the admission of the State of West Virginia into the Union, and if the Court shall be of the opinion that under the general public law which governs between nations, the property referred to in the acts of February 3 and 4 or either of them, passed by the acceptance of the ordinance and the conditional admission of the State by Congress upon the request of Virginia, the enactment of the acts of February 3 and 4, 1863, were not necessary as evidences of title, and *in no event could be anything more than that*. The learned Attorney General further says:

"It is objected to the draft of the proposed decree for the defendant that it does not direct any account to be taken ascertaining the amount and proportion of the debt of Virginia on and prior to January 1, 1861, which West Virginia should assume and pay, but contents itself with merely directing the arbitrary and

inconsequential accounts defined in paragraph second of defendant's proposed decree." This is an objection simply that the proposed decree of the defendant is upon a different theory from that proposed by the complainant. That this is true, is freely admitted. It was not intended by the draft that the Court should direct the Master to ascertain and report what *proportion* of the public debt of Virginia prior to the first day of January, 1861, West Virginia *ought to assume and pay*. That was settled by Virginia and West Virginia nearly fifty years ago. The latter was required to take upon herself a just proportion of the debt, and the two states agreed how that should be ascertained. The draft proposed by the defendant is in literal execution of the contract of the parties, as evidenced by the ordinance and section eight of the first constitution.

It directs the Master to ascertain and report:

(a) The amount of State expenditures made by the Commonwealth of Virginia prior to the 1st day of January, 1861, within the territory now included within the State of West Virginia, since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of August 20, 1861.

We agree that the last clause need not be inserted.

(b) To ascertain the aggregate ordinary expenses of the State Government of the Commonwealth prior to January 1, 1861, and since any part of said indebtedness was contracted.

(c) All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during the said period.

The items (a) and (b) are, under the ordinance, to be *charged* to West Virginia.

The item (c) is under the ordinance to be *credited* to the State of West Virginia, and when these three steps shall have been taken, and the two items *charged*, and the one item *credited*, the *sum which it was agreed between the two States should constitute a just proportion of the debt of the Commonwealth of Virginia prior to January 1, 1861, which West Virginia assumed, will have been ascertained*. It is vain to refer to these as "arbitrary and inconsequential items."

They are the items which Virginia herself framed and required to be accepted by the proposed new State as a condition of assent to her separation and admission into the Union.

The entire debt of the Commonwealth of Virginia as it existed

prior to January 1, 1861, *as averred in the bill*, and *admitted by the answer*, was contracted for, and its proceeds are alleged to have been expended in, the construction of a system of internal improvements, the greater part of which were expended in what is now Virginia, and several millions of which were, it is alleged by the Bill, and denied in the answer, expended in what is now West Virginia. It was just that Virginia should provide that there should be charged to West Virginia so much of the proceeds as were expended in the construction of internal improvements within her territory. It ought not to be very difficult to ascertain how much of the debt was expended for internal improvements within the limits of what is now West Virginia.

There is but one item in section 9—defining the manner in which the account should be taken in order to ascertain the proportion of the debt to be taken upon herself by the proposed new State—left at all indefinite, and that is item (b), “*a just proportion*” of the ordinary expenses of the State Government, since any part of said debt was contracted.” This involves a determination of the basis upon which a “just proportion” of the aggregate ordinary expenses of the State Government during the said period is to be ascertained. Shall it be population or territory, or both, or taxable values? We are strongly of the opinion that it should be based upon population, since “government”—including the administration of justice, the making and administering of the laws, the education of the children through a system of common schools, academies and a State university, the maintenance of State institutions, the support of prisoners, the care of the insane and paupers, and the like—is for *people*, not *acres*. It is difficult to conceive of *government* except in its relation to *people*, and so, it has seemed to us that the basis must be population. We therefore suggest that there should be added to the draft proposed by the defendant, in respect of an ascertainment of the aggregate ordinary expenses of the State, a direction to the Master to find alternatively certain facts substantially as follows:

“For the purpose of enabling the Court to determine the just proportion of the aggregate of the ordinary expenses of the State Government of the Commonwealth of Virginia prior to January 1, 1861, and since any part of said indebtedness was contracted, said Master shall ascertain and report the population during the said period of the counties now constituting the Commonwealth of Virginia, and separately the population of the counties now constituting the

State of West Virginia, as shown by the decennial censuses taken during the said period by the United States, and also the average population of Virginia during each of said periods of ten years."

The aggregate ordinary expenses being found, and the items suggested as to population, it will be easy to determine the "just proportion" if that is the proper basis.

We submit that this case should not be cast at large, with no definition of the principles to govern his action, into the hands of a Master; that at least it should be settled before a reference for the *purpose of taking an account*, whether the liability of Virginia to West Virginia is upon the *special agreement* which preceded and accompanied her admission into the Union, *or, because of the absence of a special agreement*, upon the basis of *population and territory*.

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Supreme Court of the United States.

OCTOBER TERM, 1907.

Reply Brief for Virginia.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

IN EQUITY. ORIGINAL, NO. 4.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

REPLY BRIEF FOR VIRGINIA UPON MOTION TO REFER THE CAUSE
TO A MASTER.

The propositions contended for by the counsel for West Virginia in their elaborate brief upon the above motion will be here reviewed, though not in the order in which they are presented.

AS TO ORDER OF PROCEDURE.

While this court in *Rhode Island v. Massachusetts*, 14 Peters, 210, 257, considered it proper that the proceedings in that case should "be regulated by the rules and uses" of the English Court of Chancery, it declared that:

"in a controversy where two sovereign States are contesting the boundary between them, it will be the duty of the court to mould the rules of chancery practice and pleading in such a manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned are too great, to be decided upon the mere technical principles of chancery pleading." 14 Peters, 257.

It will not be gainsaid that this language applies with added force to this case.

The only rule of chancery practice adopted by this court, is in accordance with this just conception of its powers and duties, and is as follows:

“Rule 3. This court considers the former practice of the courts of King’s bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.”

Neither the technical rules of practice obtaining in the circuit courts of the United States; nor those approved by Mr. Bates and other learned text-writers; nor those sanctioned by any other tribunal whatever will *control* this court in the matter of the procedure and processes which it may deem necessary and proper to adopt, in order to attain the ends of justice.

This results from the very nature of its powers and duties in a case like this, as to which its jurisdiction is not only exclusive, but final, plenary and absolute.

In this its only rule upon the subject, the court has indicated the former practice of the courts of chancery in England as “affording outlines” for the practice of this court in chancery causes.

If we look to the practice of the English courts in chancery, and to the chancery practice sanctioned by the courts and jurists of this country, precedents and authorities will be examined in vain to find any sanction for the proposition that each of the six rules laid down by Mr. Bates in the section quoted in the brief for West Virginia, must be complied with before there can be a decree for an account in a case like this; nor are we willing to believe that the learned counsel for the defendant would carry their contention to any such extremity.

2 Daniel’s Chy. Pl. & Pr. (5th Ed.) p. 1004 and note 7;

Adam’s Equity (8th Ed.) Book III, Chapter 1, M. pp. 220 to 222-226;

Story’s Eq. Pl., Sec. 218 & note (b);

1 Story’s Eq. Jurisprudence (13th Ed.) Chapter VIII. Titles, Account, Apportionment, and Partnership, Sections 450, 469 to 477-483-488-671.

The general rule is that a decree for accounts, or order of reference is from its nature interlocutory, because it directs an inquiry and contemplates the bringing of new and additional facts into the record.

It would be practically impossible to state in advance all the principles of law which might apply to the facts as they might thereafter be developed. As if an account of debts were ordered against a partnership, corporation, or estate, it would be impracticable to state in advance what rules of law should obtain in regard to the establishment of such debts; as for instance, what might be valid defences, such as failure, or want of consideration, the statute of limitations, payment, set-off, &c., any of which might be interposed against the different debts as presented, and no one could say in advance to what extent they might be applicable or valid.

"A decree is understood to be interlocutory whenever an inquiry as to a matter of law or fact is directed preparatory to a final decision." *Bebee v. Russel*, 19th How., 285, and in the same case we find the following citation from the 2nd volume of Perkin's *Daniel's Chancery Practice* 1193, "that the most usual ground for not making a perfect decree in the first instance, is the necessity which frequently exists for a reference to a master of the court, to make inquiries, or take accounts, or sell estates and adjust other matters which are necessary to be disposed of, before a complete decision can be come to upon the subject matter of the suit," p. 285.

The primary purpose of this suit is to invoke the equitable jurisdiction of "Account"; to have the account between the parties involving more or less complicated transactions, made up of a vast number of items running through a period of more than seventy years, stated, in order to obtain from the defendant the amount for which she shall be thus ascertained to be equitably liable.

The principal facts upon which the complainant's claim depends, namely: the formation of the new State out of the territory of the Commonwealth of Virginia; the existence of a public debt of the undivided State of some \$33,000,000.00 at and before that event, a large part of which remains an unsatisfied and binding obligation upon both States; the ordinances, public acts, and fundamental stipulations and enactments by which West Virginia assumed, and became liable for an equitable proportion of that common indebtedness,—all of these and other material facts are alleged in the bill, and are, either not controverted by the defendant's answer, or are established by the documents and public records filed with the bill, or are a part of the history of the two States, and of the times, and of the country.

The facts which justify the complainant in instituting her suit for an accounting, and for a decree thereupon, are thus sufficiently

established to entitle her to a decree to that end. Indeed, we had supposed that the decree of this court overruling the defendant's demurrer, had pretty well settled this.

If precise proof of Virginia's claim should be required to be made, before a decree for an accounting would be entered, it would be necessary for the court to devote months of its time to the examination of the books, accounts, documents, and transactions of the Commonwealth, in connection with the creation of the debt, the expenditures made in the counties now constituting West Virginia, and the payments made from those counties into the treasury of Virginia, during a period of forty years or more, and also to the examination of the records of both States in reference to the lands and other property which West Virginia received from Virginia.

It is difficult to conceive how a stronger case could be presented for the exercise of the equitable jurisdiction of "Account," "in order to bring the case to a final hearing upon the merits."

But while the case is not in a condition for the court to intelligently and fairly "pass upon all the issues made in the pleadings," it is in condition for a decree of reference, in which decree the principles upon which the account shall be stated should be settled, so far as it is practicable to do that from the data now in the record, and without doing injustice to either party.

In the draft of decree tendered on the 7th of last December by counsel for the complainant, some important questions were left open which we are prepared now on further consideration to say, it would be as well, or better, to have settled in advance.

To this extent we concur, upon this point, in the views presented by the learned counsel for West Virginia.

While the basis of settlement prescribed by the Wheeling Ordinance is, as we have always considered it, arbitrary and inequitable, we have never taken the position that that Ordinance, *reasonably and fairly construed*, and taken and applied together with the Act of the Restored Government of Virginia of February 3, 1863, and section 8 of Article VIII of the Constitution under which West Virginia became a State, was not binding on both States.

While thus construed and applied, the amount and proportion of the public debt assignable to West Virginia will doubtless be much less than it would have been equitable for her to have assumed and paid, we are constrained to the opinion that the plan of settlement prescribed and sanctioned by the foregoing enactments is binding upon Virginia.

It is due to candor also, to say that, although it is true that the Convention which enacted the Wheeling Ordinance, was not called, constituted, or organized in accordance with the requirements of the Constitution and laws of Virginia, and was a revolutionary body; although it could then have been shown that that Convention and its acts were invalid, and may now be contended that the Convention and the Wheeling Ordinance which it adopted, were fictions, nevertheless, they and their offspring, the Restored Government of Virginia, and the State of West Virginia, have since received such recognition and sanction from every department of the United States Government, and from the Government of Virginia also, that, what, in its inception, was a fiction, has become a *legal* fiction, and now has all of the force, if not all of the virtue, of a legal verity.

We are constrained to recognize the following propositions as true:

(a) That the State of West Virginia could have no legal birth or existence without the consent of the Legislature of Virginia.

(b) That the only Legislature of Virginia which ever gave its consent to the formation of West Virginia, was the Legislature of the Restored Government which, sitting at Wheeling on the 13th of May, 1862, gave its consent to the formation of the new State, "according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the Convention which assembled at Wheeling on the 26th of November, 1861."*

(c) That the Act giving such consent and the Legislature which passed it, depended for their validity upon the validity of the Wheeling Ordinance under which the Restored Government of Virginia was organized.

(d) That said Convention, and its acts, and the Government which it established, have been legitimated, by recognition by every department of the Government.—by the President of the United States in his official intercourse and dealings with the Governor and officials of said Restored Government, by approving the bill for the admission of West Virginia, and by his proclamation announcing

*At the time of the argument upon the demurrer, counsel for complainant were under the impression that this Legislature had not been convened pursuant to the proclamation of the Governor, without which proclamation the meeting of the Legislature would have been, under the then Constitution of Virginia, invalid; but subsequently the Executive Journal of the Governor of Virginia at Wheeling, for 1862, was found, and it appears from it that Governor Pierpont issued a proclamation under which the special session of the Legislature in May, 1862, was held.

the admission of the new State into the Union; by the Congress of the United States in the admission of Senators Willey and Carlisle elected by the Legislature of the Restored Government, by the passage of the Act approved December 31, 1862, admitting West Virginia into the Union, and by other acts; and by the United States Supreme Court, by its decision in *Virginia v. West Virginia*, 11 Wallace, p. 39, in which the Wheeling Convention and this very Wheeling Ordinance and the Wheeling Legislature of Virginia, are recognized as being a Convention, an Ordinance, and a Legislature of the Commonwealth of Virginia.

We are forced by these considerations to conclude that it is too late now to question the binding effect of the Wheeling Ordinance.

Still, it cannot be forgotten that there was not a man in the Virginia, and West Virginia, Wheeling Conventions of 1861-2, and 3, from any of the counties or cities which now constitute Virginia, except the four men admitted to seats in the Virginia Convention at Wheeling, of August, 1861, two of them from Alexandria and two from Fairfax county, both parts of the present State of Virginia; that there was no pretence that there was any representation whatever in said Conventions, or in the Legislature of the Restored Government of Virginia, from more than two-thirds of the territory and people of Virginia; and that, in a number of instances, the very same men acted as the representatives both of the people of Virginia, and of the people of West Virginia, in said Conventions and Legislatures.

The indisputable facts are, that it was the people of the counties and cities now constituting West Virginia, or their representatives, who were dealing with the people of the same counties and cities, or their representatives, and undertaking to make covenants and stipulations with themselves which would bind all the people, and the entire Commonwealth of Virginia, in matters of the utmost importance to them.

Among other instances of manifest injustice in the plan prescribed in the Ordinance, is, that it operates to exclude from the account all items of expenditure in the early years of the last century.

If the principle adopted by that Ordinance was just, why should its application be stopped in 1820?

For a number of years before that date there had been large expenditures made by Virginia in what is now West Virginia, towards which the people of that section had contributed little or nothing. For a long period after the settlement of Western Virginia, the rest

of the State had practically to carry that section of the Commonwealth.

Many times as much was expended there on public account, as it contributed to the Treasury of the Commonwealth.

All that was well enough, for it was reasonably hoped that in time, with the development of the bountiful resources of that trans-montana region and the consequent increase of its wealth, the accounts would be squared.

From the very dawn of the internal improvement policy of Virginia the dream of her leading men was the construction of some efficient line of communication between her Eastern and her Western waters.

This was earnestly advocated by Washington, and others of her representative citizens, and among these Chief Justice Marshall applied the great powers of his mind and unerring judgment in aid of a wise solution of the problem.

In 1812, at the request of the General Assembly, he devoted much of his time to arduous service as Chairman of a Commission which was created for the purpose of examining the intervening region, and ascertaining and reporting as to the best route and mode of communication between the Eastern and Western waters.

Together with other members of the Commission, the Chief Justice spent some time among the mountains and wild woods of Western Virginia, much of it then almost a trackless wilderness, in the patriotic discharge of this voluntarily accepted duty.

The report of this Commission which was evidently written by the Great Chief Justice, will be filed as an exhibit in the cause, not only as indicating the purpose and desire of Virginia at that early day to open up a highway through West Virginia, but as an interesting fact in connection with the history of the internal improvement policy of Virginia.

From 1812 down to the breaking out of the war which resulted in her dismemberment, the means and energies of the Commonwealth were largely devoted to the construction of roads, turnpikes, waterways, and railroads, and especially to lines which were designed to develop Western Virginia.

This policy generally received the earnest support of the people of what now constitutes West Virginia, and their representatives, and very little indeed of the debt would have been contracted if they had opposed it; for there was a powerful opposition to that policy

and to contracting the debt in large portions of the Eastern part of the State.

As giving some notion of the views of leading and representative citizens of Western Virginia, extracts from the message to the General Assembly, of Governor Joseph Johnson, of Harrison county, West Virginia, in January, 1852, will be printed in the appendix to this brief.

These are incontrovertible facts, to which we cannot shut our eyes, unless we would ignore the truth.

We therefore respectfully submit that these ordinances and public acts, adopted under such circumstances, should not be construed strictly against Virginia, who, without the actual consent of her people, or their representatives, was to be bound by them.

On the contrary, they should be strictly construed against West Virginia, in whose interest they were manifestly conceived and made.

That the rule embodied in the Wheeling Ordinance was not only arbitrary, and inequitable, but contrary to the usages of nations, and the principles of natural equity and public law, as enunciated by the great publicists and jurists of the world, and also as expressed by learned American authors, will be manifest from an examination of the extracts from the works and opinions of a number of these authorities which will be found in an appendix to this brief.

It will be seen that the authorities there quoted, with a single exception, all substantially agree that the rule of equity applicable to such a case is, that the common debt and common assets shall be apportioned between the two States ratably.

The only exception to this practically unbroken line of authority, is to be found in Mr. Hall's treatise on International Law. With entire deference for his ability, we respectfully submit, that the views of this learned author upon this subject are unsupported by reason or authority, and are repugnant to those principles of justice and right, from which the rules of International and Public Law derive their highest sanction.

If Mr. Hall is correct, then three-fourths, or four-fifths, of a State, could, by splitting off from the original State, escape liability for the common public debt of the unsevered Commonwealth, and leave that burden to rest exclusively upon the remaining parcel thereof.

The flagrant injustice of such a rule would be the same if it should be applied to this case, the only difference here being one, not in principle, but in degree; for, here the new State embraced perhaps one-third of the actual, and one-half of the prospective and potential

resources and wealth of the original State, instead of three-fourths, or four-fifths thereof, as in the case just assumed.

The debt was created by the whole State, bound the whole State, and should be paid by the whole State.

Its obligations rested equally upon the whole State, and upon every part of it, and should have been, and should now be, borne by every part of the undivided Commonwealth, whether each part has received its ratable shares of the expenditures made out of the money for which the debt was contracted, or not. It would be exceedingly difficult, indeed impossible, to apportion the debt upon any basis which would require each county, or each section, or each grand division, to contribute to its payment in proportion to the benefits actually received by such county, section, or grand division—and no sanction for any such principle will be found in the writings of the publicists and jurists who have considered and discussed these questions.

But, if it be true, as is indicated in the Bill, and as it can and will be demonstrated to be true, that the public debt of the Commonwealth was created largely for the construction of works of internal improvement which would develop the vast resources of Western Virginia then known to be lying there in boundless but almost useless affluence; that some of the most important and most expensive of these works would not have been undertaken, if it had not been believed that their construction would have that effect; that the policy under which and the acts by which that debt was contracted received the warm and active support of the people of the counties which now constitute the new State; *that a large part of that debt was contracted by the votes of a majority of the representatives from those counties, and against the wishes and the votes of a majority of the representatives in the General Assembly from the counties constituting the present State of Virginia; and that a very small part of the debt was or could have been created had the people from the counties now forming West Virginia, and their representatives in the General Assembly opposed its creation*,—if these facts which are a part of the history of the Commonwealth, be true, how could the amount of money which was expended in West Virginia be, by possibility, any just or equitable measure of the share of that debt which, in good conscience, she should assume and pay?

Yet, by the Wheeling Ordinance, that is made the chief measure for determining the production of the common debt which the younger Virginia should assume and pay.

Tried by every test of authority, and every standard of principle and right, the basis of settlement prescribed by the Wheeling Ordinance, was, upon its face, arbitrary, illogical, and inequitable, and yet the learned counsel for West Virginia, would, by construction, give it a meaning which would make it work even greater hardship and injustice upon Virginia, than its language fairly interpreted would justify.

Here, then, we have an Ordinance which prescribes a plan of settlement, palpably unjust and inequitable, and in contravention of both common right, and of the common public law of the civilized world.

Such an enactment clearly comes within the time-honored rule, that a statute in derogation of common right or of common law must be strictly construed—and so construed as to conform it in its operation and effect, to the principles of right and justice and of the common law, so far as this can be done without violating the manifestly expressed purpose of the statute.

See this Rule as applied to Acts in derogation of the common law.

Enrich on Interpretation of Statutes, §127, citing *Brown v. Barry* 3 Dall., 365, 367; *Shaw v. R. R. Co.*, 101 U. S., 557; *Newell v. Wheeler*, 48 N. Y., 476; and a number of other cases.

This salutary rule, especially as to statutes in contravention of common right, but also as to those in derogation of the common law, is embodied in the jurisprudence of both Virginia and West Virginia.

Commonwealth v. Gaines, 2 Va. Cases, 172-175.
Richmond City v. Daniel, 14 Gratt., 485, 487.
Delaplain v. Crenshaw, 15 Gratt., 457, 470.
Virginia & S. W. R. R. Co. v. Clower, 102 Va., 867, 871.
Wheelright v. Commonwealth, 103 Va., 512, 519.
Davis v. Commonwealth, 17 Gratt., 617.
Alexandria & Fredericksburg R. R. Co. v. Alexandria & Washington R. R. Co., 75 Va., 780, 788.
Harrison v. Leach, 4 W. Va., 383.
Harrison v. Smith, 4 W. Va., 97.
Pendleton v. Barton, 4 W. Va., 496.
McGugin v. O. R. R. Co., 33 W. Va., 63, 68.
Richardson v. N. & W. R. R. Co., 37 W. Va., 641.

To the same effect are a large number of decisions of other States, a few of which are:

Webb v. Baird, 6 Ind., 13.
Sewall v. Jones, 9 Pick., 412.

Mayor of Savannah v. Hartridge, 8 Ga., 23.

Chapin v. Persse & Brooks Paper Works, 30 Conn., 461.

Phillips v. Dunkirk R. Co., 78 Pa. St., 177.

By the express terms of the 9th Section of the Wheeling Ordinance, it was provided that:

“The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained,” &c.

That is the paramount and controlling mandate and stipulation of the clause which prescribes the portion of the debt which the new State shall assume and pay.

Our insistence is, that the residue of the clause should be so construed as to give effect to the righteous principle thus expressly made the rule by which West Virginia's liability under it shall be determined.

The enactment should be interpreted and applied so as not to defeat that purpose: *ut res magis valeat quam pereat*.

And so, whenever in stating the account between the two States under the provisions of the Ordinance, a question shall arise as to whether a particular item of charge against West Virginia shall be included in the account, such construction should be given to the Ordinance as will tend to place upon the new State a just proportion of the common indebtedness, rather than a construction which will tend to exonerate West Virginia from her just and equitable share thereof.

In other words, in the application of the arbitrary basis prescribed by the Ordinance, Virginia should, according to the equitable rules of construction which are especially applicable to this case, be given the benefit of every reasonable doubt.

If the construction and effect, which, as we understand their position, opposing counsel advocate, be given to that Ordinance, the Act of February 3, 1863, and to Section 8 of Article VIII. of the first Constitution of West Virginia, the result will be one of palpable wrong and injustice to Virginia.

The whole Wheeling Ordinance will be found printed in full in the appendix to the opening brief of counsel for Virginia upon this motion.

Its provisions and the language in which they were formulated, were manifestly the work of intelligent and able lawyers.

It fully specifies the terms upon which Virginia authorized the formation of the new State,—terms which having been recognized as

being in the nature of things fundamental, upon the acceptance of them, and the formation of a new State under them with the sanction of Congress, they became¹ contractual, and operated as a covenant binding both States.

As a necessary corollary to this, there results this now self-evident truth, namely, that no additional or new term could be added to that Ordinance, without the consent of Virginia.

While it is true that the opening brief of counsel for Virginia, upon this motion, did not accept the basis prescribed by the Wheeling Ordinance as having been *irrevocably* fixed, as the one by which the settlement must be made, and intimated that in the event that it should turn out upon the application of that scheme of accounting to the facts of the case, that it would "lead to absolutely unconscionable results, and operate to impair the obligation of the contracts by which the common debt was created, contracts which were obligatory alike upon Virginia and West Virginia, or for any other valid reason, then the scheme of settlement indicated by the Wheeling Ordinance would have to be discarded, and an equitable basis and scheme of settlement adopted."

In other words, if the basis prescribed by the Ordinance should, when applied, produce results which would shock the moral sense of mankind, and operate a fraud upon Virginia and the common creditors of both States, then it would be right for the court to adopt some other basis.

But the statement above quoted is immediately followed by this qualifying paragraph:

"It is due to frankness to say, that, while the Wheeling Ordinance upon its face, prescribes an absolutely arbitrary basis of settlement, the representatives of Virginia are satisfied, that upon a fair, reasonable, and just construction of the language of that ordinance, and of the subsequent supplemental enactments, the scheme of settlement therein defined will, when applied to the facts as stated in the bill, and as it is believed they can be established by proofs, result in fixing the proportion of the debt of Virginia which West Virginia should assume and pay, inclusive of interest, at a very large sum, though not so large a sum as it would be equitable for West Virginia to pay."

Farther investigation and consideration convince the representatives of Virginia and her counsel that fairly construed and applied, as we believe they must be construed and applied by a court of equity, the Ordinance and the constating Acts which constitute as much

a part of the plan of settlement adopted by the two States, as does the Ordinance itself, will not lead to any such unconscionable results, as would appear to be inevitable, particularly if the Ordinance be taken by itself.

It may be that the framers of those instruments built fairer than they intended. It is pretty certain that they built fairer than they knew.

Clause III., pp. 6 to 8 of the opening brief upon this motion, succinctly and frankly states the position of the complainant in reference to the scheme of settlement which we seem to be shut up to.

The following quotation from that clause (p. 7 of opening brief):

"As was indicated by this court in its decision overruling the defendant's demurrer, the Wheeling Ordinance, and Section 8 of Article VIII of the first Constitution of West Virginia, must be taken and read together: So also these constating acts of February 3, and 4, 1863, and particularly of February 3, 1863, must be taken and read together with Section 9 of the Wheeling Ordinance, and with Section 8 of Article VIII of the first West Virginia Constitution, as together prescribing the terms and conditions on which the consent of the Commonwealth was given to the formation of the new State out of her territory, and the transfer to that new State when formed of any portion of the assets and property of the parent State,"

correctly expresses the views of complainant and her counsel upon this question, as the same are stated in the Bill, in the oral arguments and printed briefs of counsel for complainant upon the questions arising upon the demurrer, and as now stated in this brief, and as, in principle at least, sanctioned by the opinion of the court upon the questions raised by the demurrer.

Various questions are suggested by the brief of the distinguished counsel for West Virginia, in respect to the meaning and effect of that Ordinance, and the basis, and principles upon which the accounts between the two States should be stated, and the settlement between them made, which questions we agree should be now determined by the court, and directions given to its Master accordingly, so far as it is practicable to do so without working injustice.

These questions will be now considered:

I.

The first of them which we ask the court now to decide is: Whether West Virginia is not justly and legally chargeable with interest?

In this connection, we must remember that the contract which we are considering was a Virginia contract.

Under the law of Virginia as repeatedly adjudicated by her highest court, the interest is incident to the obligation,—and whenever a debt is due, the debtor is bound to pay interest unless relieved from this obligation by agreement. This is, and has been the law of the Commonwealth for more than one hundred years.

In *Jones vs. Williams*, 2 Call, 106, decided in 1799, Edmund Pendleton, who was one of the great Judges of our country, delivering the opinion of the court said:

“Interest is allowed because it is natural justice that he who has the use of another’s money should pay interest for it.”

Cited with approval in *Baker vs. Morris*, 10 Leigh, 284, *McVeigh vs. Howard*, 87 Va., 599, and *Stuart vs. Hurt*, 88 Va., 342.

In *Hatcher vs. Lewis*, 4 Randolph, 152, 157, the court laid down the rule in the following expressive language:

“The interest follows the principal as the shadow does the substance.”

In *Chapman vs. Shepherd*, the court said:

“In contracts for the payment of money, interest is not given as damages at the discretion of the court, or jury, but as an incident to the debt, which the court has no discretion to refuse.”

Chapman vs. Shepherd, 24 Gratt., 377, 384.

Roberts vs. Cocke, 28 Gratt., 207.

Tidball vs. Shenandoah National Bank, 100 Va., 741.

“Interest is favored both by the legislative and judicial bodies of the State.”

Tazewell vs. Saunders, 13 Gratt., 354, 370.

In *McVeigh vs. Howard*, the Supreme Court of Appeals of Virginia said: (87 Va., 599.)

“It is the settled rule that when no day is named in the bond or note given for the payment of a precedent debt, it is due and payable on the day of its date, and bears interest from that date, though no interest be reserved. Such an instrument like a bond or note payable, in Virginia, on demand, is payable presently, and bears interest from date. This doctrine is founded in good conscience and correct morals.” * * *

Citing *Jones vs. Williams* and *Hatcher vs. Lewis*, quoted above.

Such is the law of Virginia as to interest.

The law of West Virginia in regard thereto is the same.

In *Shipman vs. Bailey*, Judge Snyder, announcing the unanimous opinion of the Supreme Court of Appeals of that State, after citing a number of authorities upon the question, stated the rule as follows:

"Other authorities of the same character might be cited, but, we think, we have given sufficient to establish the rule, which seems to be, that in contracts for the payment of money interest on the principal sum is a legal incident of the debt and a part of the contract, and wherever there is a contract for the payment of a specified legal rate of interest, whether such rate is fixed by the contract itself or by the law of the place where the contract is made, the obligation of the contract extends to the payment of such interest as fully as it does to the principal sum, and courts have no more power to change the rate of interest thus fixed, than they have to dispense with the enforcement of the contract either in whole or in part."

Shipman vs. Bailey, 20 W. Va., 140, 146.

That decision reaffirms another proposition, applicable to this case, already a part of the jurisprudence of West Virginia, by the adjudications of the Supreme Court of Virginia rendered before the birth of the new State, namely, that the *lex loci contractus* controls in the matter of the interest chargeable against a debtor.

In *Pickins vs. McCoy*, the court affirms *Shipman vs. Bailey*, and adopts the language just quoted from that decision. 24 West Va., 344-352.

Independently of these West Virginia decisions, such parts of the common law, and of the laws of the State of Virginia as were in force on the 20th of June, 1863, when the first Constitution of West Virginia went into operation, and as are not repugnant to said Constitution, were continued and declared to be the law of West Virginia. Section 8 of Article XI of the first West Virginia Constitution.

The effect of this provision was to adopt for the new State the body of the common and statute laws of the Commonwealth, so far as the same were in force within the boundaries of the new State on the 20th of June, 1863.

As a part of this body of laws, the law of Virginia as to in-

terest became, and has continued to be, a part of the laws of West Virginia.

Such, then, was the law of Virginia before, at the time of and since the formation of West Virginia, as to the legal and equitable liability of a debtor or contractor to pay interest. Such has been the law of West Virginia since the hour of her birth. And such was, and is, the law of the contract evidenced by the public Acts of Virginia and West Virginia set forth in complainant's Bill.

The framers of the Wheeling Ordinance must be presumed to have drawn that instrument with reference to the principle of equity and justice which had then and long before that time been embodied in the laws of Virginia by the repeated decisions of her highest court.

To Virginia lawyers of that day, as since that time, Judge Calter's apt formula of the doctrine that, "the interest follows the principal as the shadow does the substance," was as familiar as any other accepted rule of equity or of law.

Under the law of Virginia in force at the time of these transactions, interest upon the portion of the debt which West Virginia was to take upon herself, was an essential incident of the debt, and its payment as much a part of the obligation as was the payment of the principal.

But, even if the *lex loci contractus* had not brought us to this conclusion, the language of the ordinance itself, fairly construed, leads to the same result.

That language is that:

"The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," etc.

Now, that debt was an interest bearing debt. It was represented by obligations of the undivided State, some of them payable at a future day, some of them at a future day and thereafter at the pleasure of the Commonwealth, but all of them interest bearing obligations, obligations in which the payment of the stipulated interest was made as much a part of the debt as was the payment of the principal.

The interest was as much a part of the debt as was the principal, and as many of the bonds were payable thirty-four years after date, and some of them at the pleasure of Virginia with interest from date, the interest as to much of the debt constituted much the greater part of it.

It was the manifest intention of the enactors of that Ordinance, unless we are to ascribe to them the sinister purpose of perpetrating flagrant wrong and injustice upon Virginia, that the new State should take upon itself, and relieve what remained of the old State of a part of the burden of debt which rested upon both States. They knew that that burden consisted as well of interest, as principal, and as much, or more, of interest than of principal.

It was not proposed that the new State should, as soon as she became a State pay in cash a sum to be ascertained in the manner indicated in the Ordinance. The framers of the Ordinance understood too well that under the conditions then existing, it would be impossible for the new State to raise and pay any considerable sum in cash.

Why the new State was dependent upon the old State for the money necessary to enable her to begin business and she did not have and in the nature of things could not command a sufficient amount in cash to pay off one-fifth or even one-tenth of the then Virginia debt.

The stipulation was not that the new State should pay a sum in cash on account of its share of a common indebtedness; but that it should take upon itself a just proportion of that debt, to be ascertained as in the Ordinance prescribed.

Are we to understand that a court of conscience is to be asked to construe that stipulation to mean that the new State shall take upon itself only a proportion of a part of that debt? That it shall assume a share of the principal only of the debt, but shall be exonerated from any part of the interest which was, and is, as integral a part of the Virginia debt, and of the obligations which represent it, as the branches are a part of the tree from whose trunk they spring?

In their very elaborate reply brief upon this motion, opposing counsel devote very little attention to this important question, although it was plainly in their minds when they prepared their draft of decree, and although their attention was challenged to it by the opening brief for Virginia. There is some discussion of the question at pp. 35 to 37 of their brief, but that discussion ignores the facts and the principles upon which West Virginia's legal, "equitable," and "just" obligation to assume and pay the interest as well as the principal of her share of the debt, rests.

But West Virginia's equitable and legal liability to pay interest upon her share of the debt of Virginia does not depend alone upon the Wheeling Ordinance, or upon the law of Virginia and of West Virginia which makes the interest an essential part of the debt; but it rests also upon the express terms of the Constitution under which West Virginia became a State.

Now, by the Act of the Virginia Legislature at Wheeling, of May 13, 1862, the validity of which we no longer question, for reasons hereinbefore stated, Virginia gave her consent to the formation of the new State out of her territory, "under the provisions set forth in the Constitution for said State of West Virginia and the schedule thereto annexed, proposed by the Convention which assembled at Wheeling on the 26th day of November, 1861."

It is true that this consent was predicated upon West Virginia's being erected into a State under the provisions of that identical Constitution, without the performance of which condition that consent was abortive and ineffectual.

The fact is, that at the behest of Congress, that Constitution was subsequently amended in a material particular, which change, unless objection thereto had been waived, or the change assented to by the Legislature of Virginia, would have rendered the previous conditional consent null and void.

But since the opening brief upon this motion was filed the counsel for Virginia who writes this brief has discovered the following joint resolution, which it seems was adopted by the Legislature of Virginia at Wheeling, on the 9th of December, 1862:

"No. 2. Joint Resolution requesting the House of Representatives of the United States to take up and pass without amendment, the bill for the admission of the State of West Virginia, passed by the United States Senate on the 10th of July last.

Passed December 9, 1862.

Resolved, That feeling the greatest anxiety and interest in the successful issue of the movement for a new State in West Virginia, we earnestly request the House of Representatives of the United States to take up and pass, without alteration or amendments, the bill which passed the Senate of the United States on the 10th of July last."

See "Constitution and Statutes Va. and West Va., 1861-66."

This resolution was telegraphed to Washington on the evening of the day on which it was passed. History of West Virginia by Lewis, p. 389.

The Senate Bill referred to in the resolution was taken up in the House of Representatives, and passed on the 10th of December, and was approved by President Lincoln and became a law on the 31st of December, 1862, in the very form in which the Legislature of Virginia had by its Joint Resolution of the 9th of December, 1862, requested and urged that it should be passed.

This Act of Congress to which the Legislature of Virginia had thus given its assent, made it a condition of the admission of the new State into the Union, that its proposed Constitution should be amended in the particular in which it was afterwards amended by the Convention and people of West Virginia, in regard to the emancipation of slaves.

The effect of said Joint Resolution, was, under these circumstances, to waive any objection by the Legislature of Virginia to the amendment made to the Constitution of West Virginia at the instance of Congress, and to make the consent given by the Act of May 13, 1862, effective, notwithstanding that amendment.

What, then, was the effect of the admission of West Virginia to the Union under the consent thus given, and the Constitution upon which that consent was predicated?

It will not be denied that the condition upon which the consent of the Legislature of Virginia was given to the formation of West Virginia and her admission into the Union as a State, was, that she should become a State under the provisions of the Constitution under which her statehood was sanctioned by Congress.

Among the most important of those provisions, so far as Virginia was concerned, were those expressed in Article VIII of that Constitution in reference to the public debt.

Section 8 of that Article reads as follows:

"8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

We have a right to assert that, unless West Virginia had been

required to assume and pay an equitable proportion of the Virginia debt in manner and form as was expressly prescribed in this Section, the consent of the Legislature of Virginia would never have been given to the creation of the new State.

These were, therefore, fundamental conditions of West Virginia's existence.

By accepting these conditions, the new State became bound in equity and in law to performe them in good faith.

Upon grounds which have been already indicated, as sufficient and controlling we are constrained to concede that Section 8 of Article VIII of the first West Virginia Constitution, and Section 9 of the Wheeling Ordinance being *in pari materia*, must be read together, and that the proportion of the debt which the new State was required by this provision of her Constitution to assume, was to be ascertained in the manner prescribed by the Ordinance.

But the Constitution goes farther, and expressly provides as to the equitable proportion of the debt which West Virginia should assume, that her Legislature should "provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This was precisely in accordance with the plan which had long theretofore been adopted by the Commonwealth for the payment of her debt.

This plan was embodied not only in the statutes, but also in the Constitution of Virginia in force when West Virginia, became a State.

It was embodied in that Constitution in the following terms:

"29. There shall be set apart annually, from the accruing revenues, a sum equal to seven per cent. of the State debt existing on the first day of January in the year one thousand eight hundred and fifty-two. The fund thus set apart shall be called the sinking fund, and shall be applied to the payment of the interest of the State debt, and the principal of such part as may be redeemable. If no part be redeemable, then the residue of the sinking fund, after the payment of such interest, shall be invested in the bonds or certificates of debt of this Commonwealth, or of the United States, or of some of the States of this Union, and applied to the payment of the State debt as it shall become redeemable. Whenever, after the said first day of January, a debt shall be contracted by the Commonwealth, there shall be set apart in like manner, annually, for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon

at the time of its contraction; which sum shall be part of the sinking fund, and shall be applied in the manner before directed. The General Assembly shall not otherwise appropriate any part of the sinking fund or its accruing interest, except in time of war, insurrection or invasion."

Section 29 of the Constitution of Virginia, in force from January 1, 1852, Code of Virginia for 1860, p. 47.

It was expressed in a concrete form and given further effect by the second Section of the following Act passed by the General Assembly of Virginia:

"Chap. 17.—An Act establishing a sinking fund and providing for the payment of the semi-annual interest on and redemption of the public debt.

Passed March 26, 1853.

* * * * *

"2. Whenever after the said first day of January, eighteen hundred and fifty-two, a debt shall be contracted by the Commonwealth, there shall be set apart, in like manner, annually for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction, which sum shall be part of the sinking fund, and shall be applied in the manner hereinbefore directed."

* * * * *

Acts of General Assembly of Virginia, Session of 1852-3, p. 29.

Its effect was, therefore, well understood to be to conform the undertaking of West Virginia in regard to the time and manner of the payment of her share of the debt to the plan and scheme of payment which had been adopted by the Commonwealth, and which experience had approved.

That scheme was, the creation from the annual revenues of the State, of a fund equivalent to seven per centum of the principal of the debt. Of this, six per centum went to pay the annually accruing interest, and one per centum was invested and set apart to retire the principal sum due, within thirty-four years, and this arrangement was defined as a sinking fund.

It was found, and if the calculation is made it will be shown to be true, that one *per centum* of any sum invested and compounded at six *per centum* interest per annum, will in thirty-four years produce an amount equal to such sum.

This was the theory and the plan which Virginia had adopted for the liquidation of her debt.

It was a plan with which Messrs. Willey, Van Winkle, Hail, Brown, Haymond, and other members of the first West Virginia Convention, who had been previously members and some of them able members of the General Assembly of Virginia, were doubtless entirely familiar: And it is the same plan which we find incorporated in the scheme of settlement which constitutes a part of the foundation upon which West Virginia's existence as a State rests.

By this clause of West Virginia's Constitution, therefore, it was required, not that the new State should pay a lump sum in cash, to be ascertained in the manner prescribed, but that she should *assume* "an equitable proportion of the public debt of the Commonwealth" existing on the 31st of December, 1860, and should "provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

The framers of the West Virginia Constitution thus manifestly adopted, and engrafted upon that instrument, the plan which for nine years or more had been a part of the organic and statutory law of Virginia for the extinguishment of her public debt, and the Legislature of Virginia accepted and approved that plan.

That plan included, (as the West Virginia Constitution also expressly included), an undertaking on the part of the Commonwealth to pay the accruing interest, and to liquidate or re-redeem the principal of each bond representing the debt, within thirty-four years.

(This statement is subject to this qualification, that as to a considerable portion of the debt, particularly that contracted prior to 1852, like English consols, the principal was redeemable at the pleasure of Virginia).

In simple language, the stipulation of West Virginia expressed in her Constitution, and accepted and acted upon by Virginia, was, that West Virginia would pay the accruing interest on her share of the debt, as it should accrue, and the principal thereof within thirty-four years.

That such was her express undertaking, appears from the language of her first Constitution, interpreted according to the reasonable and natural meaning of that language.

That such was the purpose, meaning, and effect of that lan-

guage, is conclusively shown when we read it in the light of the plan established by the Constitution and statute of Virginia, then in force, for the establishment of a sinking fund for the liquidation of her public debt which plan was adopted by the new State as to its share of that debt.

And so, we find that both by the express terms of the Wheeling Ordinance fairly construed, and by the express terms of the Constitution under which Virginia and the National Congress consented that West Virginia should become a State, this new State has become expressly obligated to pay interest upon the share of the principal of the common public debt for which she is liable. *U. S. vs. N. Carolina*, 136 U. S., 211.

Another question which arises in connection with the consideration of this subject, is, from what time is West Virginia justly and equitably bound to pay that interest?

Answer to this is furnished by the Wheeling Ordinance and by the Section of the first West Virginia Constitution above quoted.

The settlement by the terms of both instruments was to be made as of the arbitrary date of January 1, 1861, or to be precisely accurate, as of December 31, 1860. That, accordingly, is the date from which fairly, equitably, and legally, (because it accords with the express terms of both the Ordinance and the Constitution) the interest should be computed.

As already shown, the debt, a proportion of which as of that date, West Virginia was to assume and pay, was an interest bearing debt, and the interest was as integral a part of it as was the principal.

A farther kindred inquiry to the last is: To what time should West Virginia be required to pay such interest?

Our response to this is, that she is justly, equitably, and legally bound to pay this interest.

(1) By the terms of the Wheeling Ordinance, certainly, for the period during which the debt of the Commonwealth existing on the 31st of December, 1860, would continue to be an interest bearing debt: And we have seen that that was not only until the obligations representing the debt became due, but under the just rule of the law of Virginia as to interest, in force during the whole period of the creation of the debt, until that principal should be fully paid.

(2) By the terms of the Section of her Constitution above

quoted, West Virginia undertook that her Legislature should assume and pay the accruing interest and the principal of her share of that debt in thirty-four years.

Her Legislature has failed either to assume, or to pay that share, or any part of it.

The interest accruing thereon from December 31, 1860, has continued to accrue, as to her, until it now amounts to vastly more than the principal. It was that interest which West Virginia agreed to pay, and it was that principal for the payment of which West Virginia's Legislature was to make provision, so that the same should be paid within thirty-four years.

We are unwilling to anticipate that the learned and fair-minded counsel for the defendant will argue that West Virginia, by the language of that provision of her Constitution, is only bound to pay interest for thirty-four years from December 31, 1860, or from June 20, 1863, because we are unwilling to assume that our distinguished opponents would contend that a State, any more than an individual, should be allowed to take advantage of her own wrong, or profit by her own procrastination, and neglect of duty.

Here, West Virginia has not only not taken upon herself a just, or any other proportion of the common public debt, nor provided for the payment of the accruing interest thereon, and for the payment of the principal, but she has persistently failed and refused to do either of these things, and has by the votes of her Legislature, repeatedly repudiated any and all liability whatever for any part of that indebtedness.

(See Resolutions of Legislature of West Virginia in Appendix).

With all deference for the distinguished counsel for the defendant, we venture to believe that a court of equity will not allow any defendant, and particularly a State, which should be an exemplar of fair and honorable dealing in all of its transactions, to make gain out of its own palpable dereliction of duty.

And so, our response to such contention, if it shall be urged it, that equity will not suffer any party to take advantage of his own wrong.

Here, fortunately for West Virginia, it will, by reason of her increased wealth and prosperity, be far easier for her to pay the principal and the accumulated interest now, than it would have been to have paid the interest annually as it accrued, and the principal thirty-four years from 1861, or 1863. West Virginia

could pay thirty million of dollars now, with as little inconvenience as she could have paid three or four millions thirty-five or forty years ago.

If there ever was a case to which the benign doctrine of Virginia law, that "interest follows the principal as the shadow does the substance," should be applied, we seem to have such a case here.

Nor is there any extravagance in the language of our opening brief upon this motion, when we say that,

"any settlement which does not require that State to pay interest during the long period of her default and refusal to pay anything, would be not only unjust and inequitable, but iniquitous."

II.

The Wheeling Ordinance provides: that in ascertaining the just proportion of the debt which the new State shall take upon itself, it shall be charged with:

"all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included in said new State during said period."

There cannot well be any question as to what will be included in the first item of the debit charge against the new State under this language.

It includes all expenditures of whatever kind made by Virginia in any part of the territory embraced in the new State, since any part of the debt was contracted. There will be no controversy as to the earliest date when any part of the debt existing on the 31st of December, 1860, was contracted.

Part of the debt, then unpaid, was created as far back as 1820. So, the period covered by the account will be from, say, January 1, 1820.

There is likely to be some question as to what shall be regarded as under the circumstances, a just proportion of the ordinary expenses to be charged to West Virginia.

As to the criterion on which the apportionment of the expenses of government should be made, if this is to be the population, we respectfully submit that in this case it should be the free population—the citizenship—and not the total of the free and the

slave population. The care and policing of the slaves cost the State little or nothing. Those matters were regulated by their masters on the plantations. Of course, none of them could vote; but upon the "mixed basis" of representation which was partially adopted in Virginia, they counted to some extent in fixing the basis of representation in the General Assembly; that is, five negroes counted as much as three white men, where the mixed basis prevailed.

The debt was contracted solely by the votes of the white population or their representatives. It was expended by them or under laws of their enactment. The taxes were levied exclusively upon the property of the free population; and the revenues were appropriated and expended as they directed, and exclusively for their benefit.

The negroes owed no part of the debt, did not constitute a part of the citizenship of the State during any part of the period when the debt was contracted, or the money realized from it was expended; nor were they any part of the body politic.

Under these circumstances we would submit as a just criterion for such apportionment the white population of the territory embraced in West Virginia, and of the territory still remaining to the Commonwealth, at the times when the expenditures to be apportioned were made.

However, there is not probably, as yet, enough in the record to enable the court to decide this question intelligently; or satisfactorily.

III.

Another and quite an important question which can probably be fairly considered and decided, upon what is now in the record, and which should be decided now, if a just conclusion about it can be reached at this time; is, whether West Virginia shall be charged, in the settlement to be made, with the property or assets which she has received from the Commonwealth?

The Act of the Virginia Legislature at Wheeling, of February 3, 1863, which is printed in the appendix to the opening brief for Virginia on this motion, expressly provides that "the new State shall duly account for the same in the settlement hereafter to be made with this State." See Section 5 of the Act of February 3, 1863.

Counsel for West Virginia deny that these important items shall

be brought into the account; and in order to have any ground on which to base their objection, they contend that the Acts of February 3 and 4, 1863, were not binding upon West Virginia; that her rights were determined by the Wheeling Ordinance, and by the provisions of her first Constitution, and by the Act of May 13, 1862, of the Virginia Legislature at Wheeling, and the Act of Congress approved December 31, 1862, giving the consent of the Congress to the formation of the new State and her admission to the Union; that these Acts were all effective, and the rights of the new State definitely determined by them before the Acts of February, 1863, were passed; and that those Acts of the Virginia Legislature of February 3 and 4, 1863, were not binding upon West Virginia, and imposed no obligation upon her, because she had already, by reason of the consent given by Virginia to her statehood, been absolutely vested with the very rights which the Act of February 3rd, undertook to confer upon her upon conditions.

The answer to this argument, vigorously and ably as it is presented, is complete.

The position of the counsel for the defendant upon this point would find support in the doctrine laid down by Mr. Hall, *if there had been no agreement between Virginia and West Virginia as to the terms upon which the partition of the old State should be made, and the debt thereafter apportioned between the two States*; but neither Mr. Hall, nor any other authority will be found to sanction the proposition, that, where a new State has been erected out of the territory of the old State by treaty or by a convention between the mother State and the new State any such doctrine applies.

The rule in that case logically, and necessarily is, and must be, that where the two States have undertaken to define and prescribe the terms upon which the new State shall be created, the rights and obligations of the two States will thereafter be determined absolutely by the stipulations and provisions of such treaty or convention.

The elementary rule of universal application, that a party will not be allowed to add to, or take from, the terms of a valid written instrument applies with intensified force to a compact between two sovereign States.

The Wheeling Ordinance, which taken together with the first Constitution of the State of West Virginia; the Act of the Vir-

ginia Legislature at Wheeling, of May 13, 1862, giving the consent of the Legislature of Virginia to the formation of the new State under the provisions of that Constitution, and the Act of Congress approved December 31, 1862, giving the consent of Congress to the creation of the new State and to her admission into the Union, constitute a compact; and to this compact no new term can be added, and no term prescribed therein can be taken away.

Now, the Wheeling Ordinance, and the article of the Constitution of West Virginia referred to, are absolutely silent upon the subject of the property and assets of the Commonwealth of Virginia. While the Wheeling Ordinance, with the greatest particularity, undertakes to prescribe and define minutely the terms upon which the new State shall be created, its boundaries, and the rights of property of individuals residing therein, it makes no provision whatever in respect to property held by Virginia in her corporate capacity, whether it be personal or real. As a necessary effect of the terms of that Ordinance, the title and ownership to that property remained, after its enactment, and after the formation of the new State of West Virginia, just where they were vested before the Ordinance was enacted; and that is, in the Commonwealth of Virginia.

As already indicated no new term can be incorporated in, or added to, that Ordinance, without the consent of Virginia; and yet, the learned counsel for the defendant would have the court, by a forced construction to interpolate a new term into this Ordinance which was, as we have a right to assume, intentionally excluded from it by the parties who framed it.

If there is any contract or covenant to which the doctrine of *expressio unius est exclusio alterius* ought to apply, it is to a compact like this between States, affecting the rights of the people of those States for all coming time.

The men who framed the Wheeling Ordinance and the Constitution of West Virginia among whom were evidently lawyers of a high order of ability, intelligence, and learning, must have fully realized the meaning and effect of the Wheeling Ordinance, and must have known that it did not transfer to the new State any title or ownership in respect to any of the property and assets which Virginia owned in her corporate capacity; for we find that they, or some of them, were instrumental in the enactment of the Act of February 3, 1863, which undertook to cure this omission,

which was doubtless an intentional omission, and to vest in the new State the property and assets of Virginia, the situs of which was within the limits of the new State, upon the just and equitable terms that the new State should account for the value of all such property, in the settlement to be made between the two States.

The only settlement to be made between the two States, was the settlement in regard to the public debt; and the purpose of the Act of February 3, 1863, was to provide that the new State should account in that settlement for the value of the assets and property which she should acquire from Virginia under that Act.

The Legislature of Virginia at Wheeling had the right to exercise supreme dominion over the territory and people of West Virginia at the time that the Act of February 3, 1863, was passed; subject only to the limitations of the Constitutions of Virginia, and of the United States; so that the Act of February 3, 1863, was clearly within the competency of the Legislature of Virginia to enact; nor can we be blind to the fact that the portion of the territory of Virginia which was represented by Senators and Delegates in the Legislature at Wheeling, was practically coincident with the territory of the proposed new State of West Virginia; so that it was in fact the representatives of the people who were about to form themselves into the State of West Virginia, who enacted the Act of February 3, 1863.

Upon these grounds, we can fairly claim that the Act of February 3, 1863, was a valid law, and binding upon the people who afterwards constituted the State of West Virginia.

But that Act has still farther sanctions which make it absolutely binding upon the people of West Virginia.

The 8th Section of Article XI of the first Constitution of West Virginia is as follows:

"8. Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation; and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature." * * *

Article XI, Section 8, 1st West Virginia Constitution; effective June 20, 1863.

We respectfully insist that the effect of this provision of the Constitution was to sanction and continue in force the Acts of February 3 and 4, 1863, both of which were in force within the

boundaries of the State of West Virginia at the time that that Constitution went into operation.

But this Act of February 3, 1863, has received still farther and express sanction and acceptance by a positive enactment of the Legislature of West Virginia. Section 8 of the Act of the Legislature of West Virginia, approved December 20, 1875, Acts of the Legislature of West Virginia, Session of 1875, p. 126, is as follows:

“8. The Auditor shall institute all the necessary and appropriate measures for the collection of all claims for taxes and other demands transferred by the Commonwealth of Virginia to this State by an act of the General Assembly of said Commonwealth entitled ‘an act transferring to the proposed State of West Virginia, when the same shall become one of the United States, all the State’s interest in property; unpaid and uncollected taxes, fines, forfeitures, penalties and judgments in counties embraced within the boundaries of the proposed State aforesaid;’ passed on the third day of February, 1863.”

And therefore, we respectfully, but earnestly, claim that West Virginia is equitably, legally, and justly, bound to account for all property and assets, whether real or personal, which she has received from the Commonwealth of Virginia; in the settlement which it is the object of this suit to bring about.

There is, we think, enough in the record to show that no equitable settlement can be made between the two States upon the basis of the Wheeling Ordinance and the constating Acts referred to, unless there shall be brought into the account with West Virginia a fair charge against her for such assets, money, or property as she has received under the Acts of February 3 and 4, 1863, and upon the fullest examination and consideration which we have been able to give to the subject, we are satisfied that even then the amount with which West Virginia will be chargeable on account of the public debt of the undivided State, will be far less than she ought to have assumed and paid if we have reference to all of these facts, and all of the equities of the case.

It is proper to state here that in so far as any property or money which West Virginia acquired from Virginia, either under the Acts of February 3 and 4, 1863, or otherwise, was property which was acquired by Virginia by the expenditure of money within the limits of the State of West Virginia, or money paid by Virginia, after 1819, the new State will, of course, be charge-

able with the amount so expended or paid by the Commonwealth, under the Wheeling Ordinance, and not under the Act of February 3, 1863, in the settlement to be made between the two States, for the Wheeling Ordinance provides that the new State shall be charged with all expenditures made within its limits by the Commonwealth of Virginia, since any part of the debt was contracted.

Counsel for Virginia will file a modified draft of decree in conformity with the views presented in this brief; which we will respectfully ask the court to consider, and to enter, if they shall approve of the same.

Respectfully submitted,

WILLIAM A. ANDERSON.

Attorney General and as such Counsel for Virginia.

APPENDIX No. 1.

To Reply Brief for Complainant on motion for order of reference in *Virginia v. West Virginia*.

The doctrine of the apportionment of the public debt of a State, which is divided into two or more States.

Grotius states the principle as follows:

"On the other hand it may happen that what has been one State, is divided, either by mutual consent or by hostile force, as the body of the Persian Empire was divided among the successors of Alexander. When this transpires, several sovereignties exist instead of one, each with its own rights; *but if anything had been in common; that ought either to be administered in common, or divided in portions pro rata.*"

Grotius' Book II; Chapter 9; Section 8.

And Puffendorf says:

"Where a kingdom divides by common consent into two or more distinct Commonwealths, the public patrimony with all the debts and incumbrances upon them, ought to be equally shared among them. Tho' indeed when such separations are made by mutual agreement, there is commonly express provision made for such cases."

Puffendorf's Law of Nature & Nations, Book VIII., Chapter 12; Section 5.

Chancellor Kent thus concisely states the doctrine:

"If a State should be divided in respect to territory, its rights and obligations are not impaired, and if they have not been apportioned by special agreement, those rights are to

be enjoyed; and those obligations fulfilled, by all the parts in common."

1 Kent's Comm. pp. 25-26.

Phillimore thus clearly states the rule:

"If a nation be divided into various distinct societies, the obligations which had accrued to the whole before division, are, unless they have been the subject of a special agreement, ratably binding upon the different parts."

1 Phillimore International Law, Part II, Chapter 137, M. p. 158.

Pomeroy expresses the rule in the identical language of Mr. Phillimore.

Pomeroy's International Law, Section 74.

Mr. Dana expresses himself as to one phase of the doctrine as follows:

"In the separations and re-arrangements of nations in Europe, special provisions are usually made for the payment of public debts; and the principle seems admitted; that, in case of a division of a State, each new State is bound for the whole debt contracted by the former; and; in the case of a union of states; it seems equally clear that, as the whole must defend the part in war which is the international process of attachment it must practically pay the debt, although the foreign power may look only to the people and land of the State which made the contract. The formation of the new State so alters the nature of all the securities the creditor looked to; that the new State has a general obligation to see that he does not suffer by the change.

See Article 13 of treaty of 1839 for the separation of Belgium; and the treaty of Zurich, ceding Lombardy to Sardinia."

Wheaton's Int. L.—Edited, with notes, by Richard Henry Dana, Section 30, Note 18.

Mr. Halleck, after stating the effect of the dismemberment of a State by the loss of a portion of its territory by foreign conquest, or by the revolt and separation of a province, says:

"§27. The case is slightly different where one state is divided into two or more distinct and independent sovereignties. In that case, the obligations which had accrued to the whole, before the division are, (unless they have been the subject of a special agreement), ratably binding upon the different parts. This principle is established by the concurrent opinions of text-writers; the decisions of courts, and the practice of nations. It was incorporated into the treaty by which the modern kingdom of Belgium was established."

Halleck's International Law & Laws of War; Section 27.

Mr. John Bassett Moore thus states the doctrine:

"In the event of a State being divided into two or more independent sovereignties, the obligations which had accrued to the whole before the division are ratably binding on the different parts; for as Story says, 'the division of an Empire creates no forfeiture of previous vested rights of property.'"

1 Moore's Digest Int. L. p. 334, citing

Abdy's Kent, p. 96, and

Lawrence's Wheaton, 52 (m) 20.

A number of precedents are cited by Mr. Moore in Vol. I, Section 97, pp. 339-365, of his Digest of International Law, giving the terms upon which public debts of States have been divided and apportioned, by conventions, or treaties, between the States affected, in cases where there has been a division of territory by war, conquest, or treaty.

No sanction for the rule prescribed in the Wheeling Ordinance will be found in any of the adjustments of public debts, there recorded by the learned author.

Judge Story declared the following fundamental truth:

"It has been asserted as a principle of the common law, that the division of an empire creates no forfeiture of previously vested rights of property.

And this principle is equally consonant with the common sense of mankind and the maxims of eternal justice."

Mr. Justice Story in *Terrett and others v. Taylor and others*, 9 Cranch, 43, 50, citing *Kelly v. Harrison*, 2 Johnson, c. 29, *Jackson v. Lunn*, 3 Johnson, c. 109.

In *Hartman v. Greenhow*, 102 U. S. 612-617, Mr. Justice Field states the rule of international law in the following language:

"Writers on public law speak of the principle as well established, that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them. On this subject Kent says: 'If a State should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, their rights are to be enjoyed and their obligation fulfilled by all the parts in common.' 1 Com., 26. And Halleck, speaking of a State divided into two or more distinct and independent sovereignties says: 'In that case the obligations which have accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of courts, and the practice of nations.'" Internat. L., ch. 3, section 27.

And this language was again approved by Mr. Justice Field in his dissenting opinion in *Antoni v. Greenhow*, (in which opinion Mr. Justice Harlan concurred), 107 U. S. 769-7, where the following language is used:

"It is a well settled doctrine of public law, that, upon a division of a State into two or more States, her debts shall be ratably apportioned among them. See authorities upon this subject in *Hartman v. Greenhow*, 102 U. S., 677."

The only dissent from the principles thus enunciated by this long line of authorities by any author whose opinions would carry any weight upon such a subject which we have been able to discover is to be found in the dogma of Mr. Hall; in his work on International Law, where that learned author says:

"§27. When a new State splits off from one already existing, it necessarily steps into the enjoyment of all rights which are conferred upon it by international law in virtue of its existence as an international person, and it becomes subject to all obligations which are imposed upon it in the same way. No question therefore presents itself with respect to the general rights and duties of a new State. What, however, is its relation to the contract obligations of the State from which it has been separated; to property belonging to and privileges enjoyed by the later, and to property belonging in common, before the occurrence of the separation, to subjects of the original state in virtue of their status as such, when some of them after the separation become subjects of the new State?"

The fact of the personality of a state is the key to the answer. With rights which have been acquired, and obligations which have been contracted, by the old State as personal rights and obligations the new State has nothing to do. The old State is not extinct, it is still there to fulfill its contract duties, and to enjoy its contract rights. The new State, on the other hand, is an entirely fresh being. It neither is, nor does it represent, the person with whom other States have contracted, they may have no reason for giving it the advantages which have been accorded to the person with whom the contract was made; and it would be unjust to saddle it with liabilities which it would not have accepted on its own account. What is true as between the new State and foreign powers, is true also as between it and the old State. From the moment of independence all trace of the joint life is gone. Apart from special agreement no survival of it is possible, and the two States are merely two beings possessing no other claims on one another than those which are conferred by the bare provisions of international law. And as the old State continues its life uninterrupted, it possesses everything belonging to it as a person,

which it has not expressly lost, so that property, and advantages secured to it by treaty, which are enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continue to belong to it. On the other hand, rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcation of boundary, obligations contracted with reference to it alone, and property which is within it, and which has therefore a local character, or which, though not within it, belongs to State institutions localized there, transfer themselves to the new State person. Conversely, of course, the old State person remains in sole enjoyment of its separate territory, and of all local rights connected with it.

* * * * *

Property which becomes transferred by the fact of separation consists in domains, public buildings, museums and art collections, communal lands, charitable and other endowments connected with the State, and the like. When a portion of the lands belonging to a commune or to an endowment lies without the boundary of the new State it is only considered that a right to the value of the property is transferred. Convenience may dictate expropriation from the property itself; and it is only then necessary to pay its full value by way of compensation."

Hall's International Law, Sec. 27.

The fallacy of the positions taken by this learned author will be manifest when we reflect, that, if the Wheeling Conventions and Legislatures had chosen to annex, and had annexed fifty or sixty other counties to the new State, so that it would have embraced more than two thirds of the population and territory and actual and potential wealth, public properties, assets and resources of the undivided Commonwealth, the new State would have taken a good title to all of those assets, properties, and resources, free and discharged from any liability whatever for any part of the antecedent public debt of the Commonwealth, if the ordinances and other public acts of the Wheeling Conventions and Legislatures had omitted to impose any obligation upon the new State to assume and pay any part of that public debt.

Such a result would shock the moral sense of mankind; and yet, it would be no more unjust and inequitable than that which would confront us here, if the views of this eminent author are correct, had the Wheeling Conventions and Legislatures failed to prescribe any stipulations, provisions, or conditions as to the apportionment of the antecedent common public debt between the two States.

APPENDIX No. 2.

TO REPLY BRIEF FOR COMPLAINANT ON MOTION FOR ORDER OF REFERENCE IN VIRGINIA V. WEST VIRGINIA.

Extracts from message of Joseph Johnson, of Harrison, Governor, of Virginia, to the General Assembly of Virginia, January 12, 1852. See Journal, House of Delegates, 1852, pp. 18-19.

"The subject of internal improvement, which for many years has engaged the anxious attention of our people, is rapidly increasing in interest and importance, and will require your most serious and careful consideration. Whether we look to the vast amount of capital already invested by the State in the enterprise, or the appropriations yet required to carry out successfully the schemes already begun, and thereby make them available for revenue and State purposes—or consider the magnitude of the objects sought to be obtained, and the importance of the results anticipated from their completion in the aid they will give in developing the mineral and agricultural resources and the manufacturing and commercial advantages of our State—all will see and be forced to acknowledge the importance of the subject, and the great and growing necessity for energetic and yet judicious action on your part in relation to it. Indeed the works of internal improvement already commenced and in course of construction, and upon which large sums of both public and private means have been expended, are so intimately connected with all the leading interests of the Commonwealth, that every year's delay in their completion will necessarily postpone, at a common loss to the whole people, great and incalculable blessings, and for an equal period of time defer to the State treasury that repletion which the heavy appropriations heretofore made for internal improvement purposes so earnestly demand, and which their final completion cannot fail to effect. Many of our sister States, with less capacity for such enterprises, and possessing natural resources and advantage far inferior to our own, have, under circumstances of great embarrassment, executed works of internal improvement which would do honor to the enterprise of independent nations. Nor have they been disappointed in the individual or State benefit which their works were expected to impart. The citizens of those States feel the superiority of this improved condition of their country, and duly appreciate the increased comforts derived from it.

"If our generous and noble old Commonwealth has been tardy in the execution of those improvements most clearly indicated by the geological structure of the country, and in a proper development of her great physical resources, it is gratifying to consider, that profiting by the example of others,

she may gain much of the loss in time, by wise, prompt and energetic measures hereafter."

Then, after recommending the completion of the James River & Kanawha Canal to Clifton Forge, Governor Johnson says:

"From this point I most earnestly recommend the construction of a railroad, on State account, to some point on the Ohio river deemed most eligible upon a full reconnoissance of the several routes heretofore contemplated, having in view the valuable trade of that river and ultimately a railroad connection with the cities of Cincinnati and Louisville. In connection with this line, I recommend that every proper aid should be given for the speedy completion of the central railroad from Richmond to the point proposed at the present terminus of the canal, and that from Alexandria to Gordonsville. The railroad from the canal to Loup creek shoals would not exceed 150 miles, (to which point steamboats are now accessible), and from which to Guyandotte, should that point be selected as the terminus, it would be about 82 miles, making 232 miles of railroad. The water line by the Kanawha would be about 80, and strike the Ohio 40 miles above Guyandotte—thus giving the section of road between Loup creek shoals and Clifton Forge the double importance of being connected at both ends with water and railroad lines. The best energy of the State should therefore be turned to the speedy completion of this division of the work. There is little doubt that the Alexandria and Orange railroad and the Blue Ridge tunnel may be completed, and the Central railroad and the canal be carried to Clifton Forge by the time the railroad from the latter place to the Ohio river can be finished."

Journal House of Delegates, 1852, p. 21.

APPENDIX NO. 3.

TO REPLY BRIEF FOR COMPLAINANT ON MOTION FOR ORDER OF REFERENCE IN VIRGINIA V. WEST VIRGINIA.

House Joint Resolution No. 10, Concerning the Virginia Debt.

(Adopted February 7th, 1895.)

Resolved by the Legislature of West Virginia:

That this Legislature hereby declines to enter into any negotiation with the debt commissioners, or commission appointed under a joint resolution, adopted by the General Assembly of Virginia, in the month of March, 1894, looking to the settlement of the Virginia debt question, on the basis set forth in said joint resolution.

HOUSE JOINT RESOLUTION NO. 3.

(Adopted January 21, 1897.)

A resolution relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that West Virginia does not owe one cent of the so called "Virginia debt," and that this Legislature is opposed to any negotiations on that subject.

(H. J. R. No. 6.)

JOINT RESOLUTION NO. 3.

(Adopted January 21, 1899.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That this Legislature declines and refuses to take any action in regard to what is known as the Virginia debt, or Virginia deferred certificates, either by considering any propositions of adjustment or settlement, so called, or by authorizing the appointment of any committee or committees having for their purpose the consideration of the same; and that it is the sense of this Legislature that the State of West Virginia is in no way obligated for the payment of any portion of the said debt or certificates.

(S. J. R. No. 2.)

JOINT RESOLUTION NO. 21.

(Adopted January 16, 1901.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That this Legislature declines and refuses to take any action in regard to what is known as the Virginia Debt, or Virginia Deferred Certificates, either by considering any proposition of adjustment for settlement so called, or by authorizing the appointment of any committee, or committees, having for their purpose the consideration of the same.

And, That it is the sense of the Legislature that the State of West Virginia is in no way obligated for the payment of any portion of the said debt, or certificates.

(H. J. R. No. 3.)

JOINT RESOLUTION NO. 3.

(Adopted January 21, 1903.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this Legislature is opposed to any negotiations whatsoever on that subject. And, *further*, that this Legislature declines, and most emphatically refuses, to take any action in regard to what is known as the Old Virginia debt, or Virginia deferred certificates, either by the consideration of a proposition of adjustment for settlement, or by authorizing the appointment of any committee or committees having for their object or purpose the consideration of same; and that it is the sense of this Legislature that the State of West Virginia is in no way or manner obligated, either morally or legally, for the payment of any portion of the said debt or certificates. Nor do we owe any other State or Territory in this Union.

(H. J. R. No. 7.)

JOINT RESOLUTION NO. 3.

(Adopted January 20, 1905.)

Relating to the Virginia debt.

Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this Legislature is opposed to any negotiations whatsoever on that subject.

APPENDIX NO. 4.

TO REPLY BRIEF FOR COMPLAINANT ON MOTION FOR ORDER OF REFERENCE IN VIRGINIA V. WEST VIRGINIA.

"Chap. 78.—An Act giving consent to the admission of certain counties into the new State of West Virginia, upon certain conditions. Passed February 4, 1863.

"1. Be it enacted by the General Assembly of Virginia, That at the general election on the fourth Thursday of May,

one thousand, eight hundred and sixty-three, it shall be lawful for the voters of the district composed of the counties of Tazewell, Bland, Giles and Craig, to declare by their votes whether said counties shall be annexed to and become a part of the new State of West Virginia; also, at the same time, the district composed of the counties of Buckhannon, Wise, Russell, Scott and Lee, to declare by their votes whether the counties of the said last named district shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the counties of Alleghany, Bath and Highland, to declare by their votes, whether the counties of such last named districts shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the counties of Frederick and Jefferson, or either of them, to declare by their votes, whether the counties of the said last named district shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the counties of Clarke, Loudoun, Fairfax, Alexandria and Prince William, to declare by their votes, whether the counties of the said last named district shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the counties of Shenandoah, Warren, Page and Rockingham, to declare by their votes, whether the counties of the said last named district shall be annexed to and become a part of the State of West Virginia; and for that purpose there shall be a poll opened at each place of voting in each of said districts, headed 'For Annexation,' and 'Against Annexation.' And the consent of this general assembly is hereby given for the annexation to the said State of West Virginia of such of said districts or either of them, as a majority of the votes so polled in each district may determine: provided, that the Legislature of the State of West Virginia shall also consent and agree to the said annexation, after which all jurisdiction of the State of Virginia over the districts so annexed shall cease.

2. It shall be the duty of the governor of the Commonwealth to ascertain and certify the result as other elections are certified.

3. In the event the state of the country will not permit, or from any cause, said election for annexation cannot be fairly held on the day aforesaid, it shall be the duty of the governor of this Commonwealth, as soon as such election can be safely and fairly held and a full and free expression of the opinion of the people had thereon, to issue his proclamation ordering such election for the purpose aforesaid, and certify the result as aforesaid.

4. This act shall be in force from its passage."

Act of the General Assembly of Virginia, approved February 4, 1863. Acts of 1863. pp. 65-66.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Brief in Reply to Defendant.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

Original, No. 4.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

BRIEF IN REPLY TO DEFENDANT.

On behalf of the complainant, an order is asked for referring this cause to a master to ascertain and report—

“what amount and proportion of said indebtedness and of the interest accrued thereon should in equity be apportioned to, and be now paid by, the State of West Virginia.”

The order further provides that the master shall—

“make and return with his report any special or alternative statements of the accounts between the complainant and the defendant in the premises which either may desire him to state, or which he may deem desirable to present to the court.”

The object of this latter provision is to have stated and presented to the court the several methods or plans which, in the view of the respective parties, properly expresses and illustrates the correct method of ascertaining the “just proportion” of the

public debt of the Commonwealth of Virginia which each party should bear.

The court, having before it the accounts, stated in accordance with the views of each side, may be better enabled to judge of their respective merits and elect between them, and so avoid the delay which would be occasioned by a recommitment of the report.

On behalf of the State of West Virginia it is proposed, in section 2 of the draft of the decree presented by counsel, that the master shall state in his report—

(a) The amount of State expenditures made by the Commonwealth of Virginia prior to the first day of January, 1861, within the territory now included within the State of West Virginia since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia, at Wheeling, August 20, 1861.

(b) The aggregate ordinary expenses of the State government of the Commonwealth of Virginia prior to January 1, 1861, and since any part of the said indebtedness was contracted.

(c) All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during said period.

Among the "ordinances and acts of the restored government of Virginia, prior to the formation of the State of West Virginia," passed in the convention which assembled at Wheeling on the 11th of June, 1861, there was one ordinance, passed August 20, 1861, entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State," the ninth section of which ordinance was as follows, *viz*:

"The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period," etc.

It will be seen at once that the provision of the proposed decree is a wide departure from the Wheeling ordinance, in that it does not even propose to ascertain by the method indicated West

Virginia's "just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861." It was doubtless too apparent to the framers of the decree that the method proposed by the Wheeling ordinance had in fact, as we will show, no sort of connection with such public debt, and the account, stated as there suggested, might well have been taken, had no public debt of Virginia ever existed.

From the plan proposed by the Wheeling ordinance, as from that proposed in the decree offered by the defendant, there is altogether excluded any account of or reference to the public debt of the Commonwealth of Virginia, evidenced by bonds and other evidences of indebtedness outstanding on the first of January, 1861. The only settlement which this method could effect would be a mere accounting between two sections of Virginia, *inter sese*, of the amounts which had been paid into the treasury of Virginia from each section and the amounts which had by the appropriations of their common legislature been expended in each section during the period between 1822 and 1861.

If it should appear from such an accounting that the counties lying west of the mountains, and now constituting West Virginia, had during such period paid into the treasury of Virginia more money than had been expended by the State legislature within said counties, what possible connection could the result reached by that account have upon the outstanding public debt of Virginia? Is there any provision or principle of law under which one county, or any number of counties, in a State can claim that the amounts paid to the State in the way of legal taxes shall not exceed the amounts which such counties receive from the State in the way of legislative appropriations? Can such counties claim that they should not be required to contribute their share of the public taxes toward the payment of the State indebtedness because, forsooth, they have through a period of sixty years paid into the State treasury more money than they have received from it? Coming to the case in hand, we have the request made to this court, in the decree offered by defendant, that the master, who may be directed to ascertain and report to the court what proportion and amount of the public debt of Virginia should justly and equitably be now borne by West Virginia, shall ascertain such amount and proportion by taking the aggregate amount of the taxes and ordinary State expenses collected from the counties constituting West Virginia and the

amounts paid into said counties by legislative appropriation since 1822 and, deducting the smaller amount from the greater, report the balance so found to the court as West Virginia's just proportion of the public debt as of January, 1861.

The court has overruled the demurrer to the bill, and in doing so has stated in effect that the case stated in the bill entitles the complainant to the relief prayed, if such case is established by the proof. Is the case stated in the bill satisfied by the Wheeling ordinance?

The defendant was fully warranted in reiterating again and again in her answer that Virginia has always repudiated the Wheeling ordinance as binding on her, or as affording to any extent a satisfaction of Virginia's reasonable demand that West Virginia should contribute her just and reasonable share of that common indebtedness.

The Wheeling ordinance is impracticable, illusory, and altogether inadequate.

In suggesting here considerations which warrant us in insisting that the Commonwealth of Virginia cannot lawfully be bound by the ordinances of the Wheeling convention, which provided for the repudiation by the people of West Virginia of their liability to contribute toward the payment of the public debt of Virginia, we must not be understood as criticising in any manner the constitutional status of the State of West Virginia. It is as firmly entrenched and established as any State in the Union. What we do deny and repudiate is the claim asserted, that in matters relating to the pecuniary obligations—legal or equitable—of that State, the acts or ordinances of that convention which assembled in Wheeling in June, 1861, calling itself a convention of Virginia, and which professed to preserve, protect, and defend the interests of Virginia while actually engaged from its outset in providing for the dismemberment of Virginia—that such acts and ordinances, so far as they were designed to relieve West Virginia from her proper share of the public debt of Virginia, are of any legal, equitable, or moral binding effect on Virginia.

We object to West Virginia's proposed plan of settling the accounts, because—

(1) THE PLAN OF THE WHEELING ORDINANCE AND OF DEFENDANT'S
DECREE IS IMPRACTICABLE.

It is charged in the bill and admitted in the answer of defend-

ant that the public debt of Virginia, as of January, 1861, was about \$33,000,000, and was evidenced by the bonds and other evidences of indebtedness of the Commonwealth of Virginia issued prior to that date. At the periods when said public debt was created the counties now constituting the State of West Virginia were each represented in the legislature of Virginia and in the executive councils of that State; that such representatives in the legislature advocated and voted for the creation of this debt and the application of its proceeds to the construction of works of internal improvement, which were designed for the benefit and welfare of the entire Commonwealth; that the region now forming West Virginia was the portion of Virginia toward which the greater part of such public works tended, and it was for the development of that region they were primarily designed. Hence it is that we insist that not only on the principles of international law, but on the homelier and more intelligible rules of common honesty and morality, as well as upon legal and equitable doctrines, West Virginia is as much bound as Virginia for this public debt.

The Wheeling ordinance ignores these solemn evidences of the public indebtedness, and proposes to go back to the year 1824, through a period of nearly sixty years, and inquire into the consideration of all these evidences of a common indebtedness, and into the various objects to which were applied the moneys obtained for them as they were made and issued. It requires the production of the vouchers and evidences of every dollar paid into the public treasury of the money derived from the taxation of the counties now forming West Virginia, and of every dollar appropriated and expended by Virginia within that territory. How far such requirement can be complied with at this time, with fullness and accuracy, it is impossible to tell.

It should be enough to suggest the danger and uncertainty attending such attempt, to remind the court that the State courthouse, in the city of Richmond—the repository of many of the most valuable of Virginia's archives—was destroyed by fire at the evacuation of that city, at the close of the Civil War; and further, that many of the most valuable of the State records and files were ravaged during the period of the military government of the State and during the baleful period of "Reconstruction," when hostile aliens had control and possession of the State government and property. To require now that, in order to correctly ascertain the amount which West Virginia should contribute to-

ward the payment of a public debt, evidenced by bonds to which that State was in effect a party, Virginia should make research through her files and records of nearly sixty years and produce the evidences of the items of receipt and expenditure, so far as the territory of West Virginia is concerned, is a peril and a hardship to which she should not be exposed.

It cannot be claimed that Virginia is in default in the performance of any duty resting upon her to West Virginia. The State officers at the capitol were the common agents of both the litigants here, and both are equally bound by their acts.

It is a fact which should not be forgotten, but to which due weight should be given in any equitable adjustment of the common burden, that it was the voluntary act of the people of West Virginia in withdrawing themselves from the body politic and corporate of Virginia and surrendering all right of participation in her councils and administration of her affairs that has contributed to the present conditions.

But another and more serious objection lies to the Wheeling ordinance as a plan of adjustment. Its evident purpose was to avoid and defeat the very liability to which this bill seeks to hold her. It proceeds on the theory that West Virginia cannot be held for any other amount than the difference between the amounts she—or her constituent counties—paid into the treasury of Virginia and the amount they received from that treasury during the sixty years preceding January, 1861; and also on the theory that those counties should not be held liable for any more of the public debt than was actually enjoyed by them by the extension of the works of internal improvement into or through their territory. It ignores the fact that the liability accrued when the bonds were issued and the money for them was obtained by the State, and not when the works for which that money was borrowed were actually constructed. The construction of the works was arrested by the war. They were not all completed within West Virginia. The war arrested, it did not prevent, the completed construction; *that* was prevented by the secession of West Virginia.

At the close of the war the spirit of energetic activity which the war had quickened found employment in every field of material development. Never in its history had this country known such an era of successful enterprise and development. The vast resources of wealth in timber, coal, gas, and oil would speedily have

secured the capital for the realization of the plans which had been discerned and provided for by the generations of Virginia people sixty years and more before. The works of internal improvement for which this public debt had been created would have been completed, and Virginia's taxable wealth would very soon have been applied to the entire extinction of her public debt; but all this was defeated by the withdrawal of the territory now forming the State of West Virginia; and now that State appears in the unenviable attitude of possessing all the sources of wealth which induced the creation of the public debt—that debt which her people had largely contributed to making—while denying all liability for the bonds by which the debt was evidenced. She is willing to enter upon a settlement as prescribed by the Wheeling ordinance. That ordinance, as we have shown, provides a plan of settlement which omits altogether the public debt.

(2) THE COMMONWEALTH OF VIRGINIA IS NOT BOUND BY THE
WHEELING ORDINANCE.

It is true that this court has in one case recognized the restored State of Virginia—the “Pierpont government,” as it is called in that case—as the State of Virginia. *Virginia vs. West Virginia*, 11 Wallace, 39, was on a bill brought by Virginia “to settle the boundary line between the States of Virginia and West Virginia.” The real question presented was the validity and effect of the proceedings by which the counties of Jefferson and Berkeley were transferred in 1866 from the Commonwealth of Virginia to the State of West Virginia. We have endeavored, without success, to obtain a copy of the record of the case, to learn what exactly were the issues presented by the pleadings and the course of the proceedings had in the case in this court. It appears (page 51) to have been argued at December term, 1866, and again, after this court had been differently constituted, at December term, 1870. Justices Davis, Clifford, and Field dissented from the judgment. The case has been rarely referred to in the subsequent decisions of this court. Chief Justice Chase, who sat in the case, did, in *Caesar Griffin's case* (Chase Decisions, p. 412), referring to the State government of Virginia, say:

“Indeed, it is well proven historically that the State and the government thus organized were recognized by the National Government. Senators and Representatives from the State occupied seats in Congress, and when the insurgent force which held possession of the principal part of the

territory was overcome, and the government recognized by the United States was transferred to Richmond, it became in fact, as it was before in law, the government of the whole State. As such, it was entitled under the constitution to the same recognition and respect, in national relations, as the government of any other State."

And yet, notwithstanding this solemn judicial declaration as to the validity of Virginia's right to "recognition and respect in her national relations," it appears that on March 2, 1867, Congress, in an "Act to provide for the more efficient government of the rebel States" (14 St. L., p. 428), declared that—

"Whereas no legal State governments or adequate protection for life or property now exists in the rebel States of VIRGINIA, *etc.*; * * * and

"Whereas it is necessary that peace and good order should be enforced in said states, until loyal republican State governments can be legally established, &c."

By virtue of this act the entire State government of the restored State of Virginia was swept away—executive, legislative, and judicial—and Major General Godfrey Wetzel succeeded to all their functions.

So it seems that this restored State, on which had been poured the anointing balm of national recognition and acceptance, and which was "entitled under the Constitution to the same recognition and respect in national relations as the government of any other State," was now declared by the political branch of the National Government to have "no legal State government existing in it," and the government that did exist in it was totally abolished.

A natural inquiry is suggested: If the State government, which had been created in Wheeling in August, 1861, and removed to Alexandria in 1863, and transferred to Richmond in 1865, and continued in operation continuously until 1867, was then ascertained and declared to be "illegal," and so extinguished, when had it ceased to be a legal government, or when had it ever become a legal government? Surely, in its "national relations," it could not be both legal and illegal, or legal for some purposes and illegal for others.

Whether a State government exists, and whether it is a lawful and valid government, are political questions, and are to be determined by the political departments of the National Government and not by the judicial. The government of Virginia formed

at Wheeling, and continued until after the close of the war, was recognized by the National Government as the true and lawful government of Virginia. In all of its political conduct and relations it must be assumed by the courts to be the true and lawful government of the State. But when it appears, as it does here, that the people of that part of the territory of Virginia which now forms the State of West Virginia were in fact the only people represented in the convention assembled at Wheeling on the 11th of June, 1861, and in the legislatures of Virginia held under the authority of that convention; that the leading object and purpose of those people in assuming the insignia—the title, powers, and authority of the Commonwealth of Virginia—was only to enable them to erect within the territory of Virginia a new State, and to appropriate to its uses all the property of Virginia under their control, and at the same time to absolve themselves from all liability on those bonds which they had united in making, as the evidences of that public debt which they had insisted on creating, then other considerations must apply.

The fiction that the people west of the Allegheny mountains were “the people of Virginia;” that the government which they organized in that region was the government of Virginia; that it became invested with all the powers and authority of the ancient Commonwealth of Virginia, ceases to apply. That fiction has served its purpose; the National Government has recognized this government, for all political purposes, as the Commonwealth of Virginia, and has accepted as valid and efficient the consent given by it to the erection of a new State within the borders of Virginia. Such recognition was the exercise of a power which belonged to the political departments alone. As to the propriety of its exercise the judicial branch is without jurisdiction to inquire. But into the conduct of this government in relation to its civil rights and liabilities—its liability on bonds and contracts, or under the application of equitable doctrines—the judicial courts may inquire, may take jurisdiction, and afford relief. Such courts may inquire into the validity and the *bona fides* of State action. It may ascertain and declare such action to be an impairment of the obligation of contracts. Inquisition may not be made into the motives or the good faith of the law-makers, whether in convention or in legislature, but the actions of these bodies may be annulled or disregarded when they appear to have been procured by fraud, as the judgments of the courts may be without impeachment of the motives of the judge who presided.

In *Graham vs. Folsom*, 200 U. S., 253, this court, speaking of an attempt by a county to rid itself of debt, said:

"But courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of a State, but they will not ignore the effect of its action."

The Wheeling ordinance was ordained by a body of citizens who proclaimed themselves to be citizens of Virginia, assembled in convention to reform and establish her organic law. Their religious duty was to preserve, protect, and ameliorate her material interests; and yet it is manifest that their paramount object was to despoil Virginia of one-third of her territory; to erect upon that portion so cut off a new State, and to endow it with all the money and other property of Virginia found within the limits of the proposed new State. This purpose was actually carried into effect. These things were not conceived and performed to promote the welfare of Virginia. The citizens of Virginia by whom they were done looked not to the welfare of the State whose citizens they were, but to the welfare of that new State, for whose erection they were then providing and the dawn of whose creation was already appearing. The ordinance is entitled "*An ordinance to provide for the formation of a new State out of the territory of this State.*" and was passed August 20, 1861. It should be construed, then, in the light of its professed object. Its provisions, so far as they related to the public debt of the Commonwealth of Virginia, and to the ascertainment of the contributive share which the new State of West Virginia should bear, must be construed as designed to secure the interests of West Virginia as opposed to those of Virginia. But one body corporate and politic then existed, but this very ordinance, as its title and body shows, was to partition this existing body and create another body, with opposing and antagonistic interests. The framers of the ordinance were in a little while to become citizens of the new and opposing body. They legislated for their own future interests and not for the interests of Virginia. Hence it was that in framing this section of the ordinance which prescribed a method of ascertaining the portion of the common burden to fall upon West Virginia they ignored the bonds which evidenced the common debt and provided for an adjustment which involves the items of receipts and expenditures between the two sections of Virginia through a period of nearly sixty years.

The fiction of the restored State of Virginia is again invoked

to shield the actual truth. It cannot serve it. It has long ago fulfilled its only mission. It is now too thin and transparent to conceal the truth.

We have already shown, and the attention of the court cannot be too earnestly called to it, that the ordinance, in providing a plan for ascertaining the "just proportion" of the public debt which West Virginia should bear, makes no further reference to that public debt than the words contained in its opening sentence. The plan of ascertainment does not in any way involve the debt. It relates only to the amounts which the two sections of the Commonwealth had paid into the treasury of the Commonwealth and had received from that treasury since 1822. As a plan of ascertaining West Virginia's share of the public debt, it was illusory, disingenuous, and inadequate, and wholly in the interest of the people who framed and passed it.

It cannot be tolerated that one of the parties in interest should be the sole arbiter of the proportion or amount of the common burden which it will bear, or, as contended here, that a plan prescribed by one-third of the people of Virginia should be made the exclusive rule of measurement by which their share of the public debt of the whole people must be ascertained; and this although such one-third had separated themselves, and had met in convention, calling itself the convention of Virginia, which by an ordinance had provided for the erection of a new State within the territory occupied by them, and had by the same ordinance prescribed this rule for the ascertainment of its "just proportion" of said public debt. It is true, as stated in the answer, that Virginia has always denied that the Wheeling ordinance was binding upon her.

We submit that the debt for which West Virginia is liable is evidenced by the bonds and other evidences of indebtedness of the Commonwealth of Virginia prior to January 1, 1861. We have assumed—and no reason had been shown against it—that, taking into the account the population, area, and values of West Virginia, a reasonable and just proportion of the common burden was two-thirds of the public debt as the proper share to be laid upon Virginia and one-third of it as the proper share of West Virginia.

Apportioning the common burden on this basis, it would yet be competent for West Virginia to show on the taking of the account any just grounds that she may have of abatement of the

amount thus ascertained, whether by payments, set-offs, or otherwise. The amount of the public debt is admitted to be about \$33,000,000. The exact amount can be readily ascertained. This should form the basis of any accounting between the two States. It is a fixed and certain factor. The liability of West Virginia for a just and reasonable proportion of this debt is not denied. The proportion in which it should be borne by the two States must be determined by some rule which the court may prescribe or which the master may adopt. The result is then readily ascertained.

If the court desire it, the master may be instructed as to the principles, rules, and methods which he must employ in stating and settling the account, or he may be authorized to return with his report such alternative statements of the account as to him may appear proper or as either party to the cause may require.

In the argument of counsel for West Virginia in support of the demurrer to the bill it was pointed out that by section 8 of article 8 of the Constitution of West Virginia it was provided that—

“An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years;”

and that by the act of May 13, 1862, of the legislature of Virginia it was provided—

“That the consent of the legislature of Virginia be, and the same is hereby, given to the formation and erection of the State of West Virginia within the jurisdiction of this State, * * * according to the boundaries, and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the 26th day of November, 1861.”

From these two provisions the conclusion was deduced that a compact had been entered into by the two States, by which the legislature of West Virginia was made the sole arbiter of the fact and the amount of West Virginia's liability.

The court in its opinion (206 U. S., 320) disposed of that contention by saying:

"When Virginia, on August 20, 1861, by ordinance provided for the 'formation of a new State out of the territory of this State,' and declared therein that 'the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861,' to be ascertained as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its legislature should ascertain the same as soon as practicable, it referred to the method of ascertainment prescribed by the Virginia convention."

the soundness of which reasoning cannot be questioned. The court was dealing with the question before it, which was the demurrer of West Virginia to the bill of Virginia. On the demurrer, all the allegations of the bill were taken for true. It was a fact that such ordinance had been adopted by the convention assembled at Wheeling. It was also a fact that the matters recited were in the acts and proceedings of the legislatures and conventions; but it was even more significantly the fact that the members of the Wheeling convention of August, 1861, and the members of the convention that framed the constitution for West Virginia knew what was in each other's minds, and what had been the acts of each body, for they were the same people, and it was all done in the same convention and at the same time, as appears by the official records (11 Wall., p. 41).

The court, in its opinion on the demurrer, did not decide or intimate any opinion as to the validity, or legal effect, or binding force of the Wheeling ordinance on the people of Virginia. It was manifest from the bill that the Wheeling ordinance was referred to there only as an additional expression by West Virginia people of their liability for the public debt. Virginia had never recognized for a moment that she was bound by an act which had so plainly for its object the casting upon her of the entire burden of the debt. The answer of defendant here complains that Virginia had persistently repudiated all responsibility for and liability under that ordinance.

THE TRUE BASIS OF VIRGINIA'S RIGHT TO AN ACCOUNTING.

In paragraph VIII of the bill (Record, p. 10) five grounds are indicated on which the liability of West Virginia rests. The first of these grounds is that the mere partition of the territory created the liability. Writers on international law agree that—

"In the event of a State being divided into two or more independent sovereignties, the obligations which had accrued to the whole before the division are ratably binding on the different parts; for, as Story says, 'the division of the empire creates no forfeiture of previously vested rights of property.' And so *ex contrario*, where several separate States are incorporated into one sovereignty, the rights and obligations that belonged to each before the union are binding upon the new State; but, as General Halleck points out, of course the rule must be modified to suit the nature of the union framed and the characters of the act of incorporation in each particular case."

1 Wharton, International Law Digest, sec. 5, p. 19, citing authorities.

1 Oppenheim on International Law, p. 122.

Wheaton, International Law, 4th English ed., p. 46.

Hartman v. Greenhow, 102 U. S., 672.

In 5 Moore on International Arbitrations, pages 4618-19, the case of the "Tarquin" is reported. On page 4619 it is said:

"This claim was in the nature of a public debt, founded upon the King's decree, and by the rule of international law public debts are not extinguished upon the division of a State into distinct States, whether that division be by war or by mutual consent; but they must be discharged either jointly or severally, according to the principles of justice and equity," &c.

The partition of territory alone, without agreement and without consent, imports an equalization of the burdens which were incident to the territory between the partitioners. The only question is, by what rule shall such equalization be made?

It is charged in the bill, and indeed is matter of public history in Virginia, that the sole purpose had in view in the construction of the works of internal improvement for which this debt was created was the development of the natural resources of the region to the west of the Alleghany mountains. The action of the delegates from that region in the General Assembly of Virginia confirms this.

The answer of the defendant denies this, and affirms that they were constructed for the development of the eastern part of the State. There were no natural resources in the eastern part that could be developed. The seacoast was there, and it was to bring to the coast the timber, coal, and other minerals of the west that the turnpikes, railroads, canals, and bridges were constructed. The reports of the Commissioners of Public Works through many years will attest this.

The enlightened sense of equity and justice throughout the civilized

world has now become crystallized in the rule of international law which is stated above. That is the rule which Virginia asks may be applied here, and not the rule of the Wheeling ordinance, framed by the very people who then and now were guided and controlled by the single purpose of protecting West Virginia from this very liability.

It was not necessary that Virginia should have paid off the entire public debt before it could call on West Virginia for contribution. It was as much the debt of West Virginia as it was of Virginia. Virginia comes into court and invokes the application of those well-settled doctrines of equity of exoneration and of *quia timet*, and prays that the burden may be adjusted by the court in accordance with those doctrines and methods of procedure.

1 Spence, Equity Juris. (marginal), page 662.

3 Pomeroy, Equity Juris., section 117 and notes.

The act "to provide for the funding and payment of the public debt," approved March 30, 1871 (Record, p. 13), recites that—

"Whereas in the formation of the State of West Virginia, there were included within its boundaries about one-third of the territory and population of the State of Virginia; and whereas in the ordinance authorizing the organization of said State, it was provided that the said State should take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this State, and will continue to be made as long as may be necessary; and whereas the people of this Commonwealth are anxious for the prompt liquidation of her proportion of said debt, which is estimated to be two-thirds of the same."

The estimate here referred to, of the proportions in which the "public debt of the Commonwealth of Virginia" should be borne by the two States into which the territory of that ancient Commonwealth was now divided, was not recklessly arbitrarily assumed, but was the result of a careful and intelligent reckoning. The territory and population of each State was considered, and the value of such territory taken into account, embracing therein all those constituent elements, natural and artificial, which enter into and make up the wealth of a State. The seacoast, the navigable rivers, the agricultural lands, with the works of internal improvements, in varying stages of completion, which formed the value of Virginia, and the vast mineral wealth of coal, gas, oil, and the forests of hardwoods of inestimable value that formed the wealth of West Virginia. The elements of wealth

duly considered, it was thought that West Virginia should bear, at the very least, one-third of the common public debt. It is charged in the bill that "West Virginia had vast potentialities of wealth and revenue in the undeveloped stores of mineral and timber which had been known for many years prior to the first of January, 1861, and their prospective values, if made accessible to the markets of the country were understood to be well nigh beyond computation." The answer of West Virginia admits the charge, but avers "that the same was inaccessible, and of very little value on the first of January, 1861." And yet on July 1, 1832, when the restored State of Virginia, through her Senators and Representatives in Congress, was endeavoring to have the new State erected within the territory of Virginia, one of those Senators, Willey, employed as an argument in support of the creation of a new State, the existence of the vast resources of mineral wealth in that territory. He said:

"Here is an opportunity presented to the Senate to erect northwestern Virginia into a free State, a condition for which she was designed by the God of nature—the richest portion of this broad land in mineral resources—with inexhaustible marble quarries equal to those of Egypt and very similar; rich in inexhaustible fountains of salt and oil, and forests exceeding any of those that ever waived upon Mount Lebanon itself, that have remained from the foundation of the government of the State of Virginia, undeveloped, useless, valueless, simply because we have not been able to organize improvements within and under the control of the western section."

Congressional Globe, second session of Thirty-seventh Congress, 1861-'2, p. 3037.

And on the 14th day of the same month, in the same debate, he said:

"This new proposed State contains within its towering hills and mountains treasures richer perhaps than can be found within the limits of any other State within this Confederacy, and there they have lain ever since the establishment of this Government, undeveloped, unworked, valueless, and they must continue to remain so unless a different policy is pursued."

Ibid., p. 3317.

It was this potentiality of wealth that those railroads, turnpikes, canals, and bridges were being constructed by Virginia to develop and realize for which this public debt of the Commonwealth was created. It was this vast wealth which was in the view of Senator Willey, in 1862, when in the Senate of the United States he urged it as a strong

ground why the new State should be laid off in the limits and from the territory of Virginia; that such new State would be a free State, and all this wealth of which Virginia would be thus despoiled would become the exclusive property of the new State, and that the provision made by the Wheeling ordinance for ascertaining the just proportion of the public debt of Virginia to be borne by the new State would not embrace or take into account any portion of this public wealth. It was this vast wealth which, in the estimation of Virginia in 1871, imparted so great value to the hilly and mountainous territory of West Virginia that, in computing the just proportion of the public debt which West Virginia in equity and good conscience should bear, she reckoned with extreme moderation that the territory of West Virginia was equal at least to one-third of that of Virginia, and so did she apportion their respective contributive shares of this common liability.

But it is suggested that an account is necessary to ascertain the amount which West Virginia should contribute, and, further, that such account should be taken on the principles of a partnership account.

We cannot perceive in the relations existing between Virginia and West Virginia any of the features which distinguish a partnership. A partnership has been defined by this court to be—

“a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some one or all of them, in lawful commerce or business with the understanding that there shall be a communion of profits thereof between them.”

What was the contract and who were the parties and what were the terms of any partnership when the common debt, here sought to be apportioned, was created? The Commonwealth of Virginia was a political body, a sovereign corporation, a member of the Federal Union when she created this debt, and issued her bonds therefor. The counties of Virginia, which now form the State of West Virginia, were in no sense partners with the other counties of Virginia. They were all members of one body. The welfare of one member was the welfare of the entire body. These counties, by their own voluntary act, seeking their own exclusive selfish interests, procured their separation from the body corporate and politic of Virginia, and, after they had done so, they sought and obtained the political recognition and support of the National Government to gain for themselves separate political existence and autonomy. On the principles of international law, they remained liable for a just proportion of the pub-

lic debt of Virginia. What doctrine or maxim of equity can be invoked to entitle these counties to demand a marshaling of the assets of Virginia? What indeed would be counted as constituting those assets? If a partnership existed, then all the partnership fund constituted the assets and not any particular part of such fund. The debt which is here sought to be apportioned was not created on the security of any particular asset of Virginia. It was created on the faith and credit which the lenders of money extended to the Commonwealth of Virginia. The bonds which the Commonwealth issued were the obligations of the whole State and for which the entire State was liable. They were not the bonds of the counties of Virginia *jointly*. They were the several obligations of one body politic. The debt evidenced by them was the debt of the State sanctioned and imposed by the people of Virginia, through their General Assembly, acting within constitutional limits. *How* the money derived from these bonds was expended by legislative appropriations, or *where* it was expended, are considerations which should not even be inquired into in this proceeding, for it matters not in the present inquiry whether the entire debt of \$33,000,000 was expended within the limits of Virginia or of West Virginia, so that it was expended by a legislature in which all parts of the State were fully represented. The expenditure must be conclusively presumed to have been made in good faith and for the welfare of the whole body politic. Two thousand five hundred years ago Aesop illustrated this in the fable of the "Belly and the Members." The liability, or the measure of the liability, of the two States into which the territory has since been divided can in nowise depend upon the amount of the proceeds of the loan which may have been expended in each. If any valid, actual, legal agreement was entered into between the two States, by which the proportion in which they should contribute to the common burden was fixed, or if any means were agreed on by which such proportion should be ascertained, then such agreement must control. But if no such agreement can be shown, then on principles of international law each State remains liable for the whole debt, and the apportionment of the burden between them is a judicial matter to be settled by the courts.

How shall the proportions of this debt to be borne by the two States, respectively, be ascertained? Virginia, in 1871, estimated that it should be borne in the proportion of two-thirds by Virginia and one-third by West Virginia. She formed this estimate by computing the vast undeveloped mineral wealth of West Virginia—her "unsunned

gold"—as making her equal to one-third of the entire value of old Virginia, including therein all the works of internal improvement, completed and uncompleted, that remained within the limits of the present Virginia. But suppose this estimate of Virginia should not be adopted, how should the court ascertain the just proportion? It is suggested that West Virginia should be charged with only so much of the public debt as was actually expended within her borders, and Virginia should be charged with so much of said debt as was actually expended within her borders. But we have shown that whenever or however the amount of money represented by the debt was expended within the limits of old Virginia, it was all expended for the benefit of the whole body of the State. That the counties constituting West Virginia seceded from the old State before the improvements were completed, and thus prevented this completion, and that she sought by such secession and has now succeeded in monopolizing for her own exclusive use all those stores of natural wealth which would have afforded to the old State the basis of taxation by which the public debt could be easily and speedily discharged, surely affords her no equitable ground for an apportionment of liability on such a basis. If an accounting is to be had on the basis of the wealth of the respective States, then in estimating such wealth it will be impossible to ignore or disregard the mineral wealth of West Virginia. Her coal and oil and gas and marble and timber must be taken into the account, not according to their taxable values in 1861, but according to the values which would have been given to them by such an appraisal as would have been made of them in a suit for partition. The present material condition of West Virginia is but the fulfillment of the expectations that were entertained by the people of Virginia a hundred years ago. It was foreseen when the scheme of internal improvements was entered upon in 1820. It was foreseen and appreciated by Senator Willey in 1862. It was distinctly appreciated and estimated by the legislature of Virginia in 1871, when it reckoned the just proportion of the public debt of Virginia as of 1861 which should be borne by West Virginia at one-third of the aggregate amount of that public debt.

THE "SPECIAL AGREEMENT" THEORY.

It is claimed on the part of West Virginia (Brief for Defendant, p. 11) that a "special agreement" was entered into between the States of Virginia and West Virginia, by which the method prescribed by the Wheeling ordinance was adopted as the exclusive method of as-

certaining the amount of that "just proportion" which it was declared West Virginia should bear.

The "special agreement" relied on by defendant appears to be that feature of the Wheeling ordinance which prescribes the method for ascertaining what is the "just proportion" of the public debt to be borne by West Virginia. Section 9 of the Wheeling ordinance presents two distinct features, which must not be confounded with each other, viz: (1) A recognition of the liability of West Virginia for a just proportion of the public debt, expressed in these words

"The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861."

It was this feature that is referred to in paragraph XVIII of the bill, and which defendant, on page 7 of his brief, insists is a recognition by plaintiff of the terms of the ordinance. (2) The method by which such "just proportion" shall be ascertained, expressed in these words—

"to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period."

In pointing to the Wheeling ordinance as a recognition of West Virginia's liability for a just proportion of the common debt, section XVIII of the bill cannot be construed as an admission of the validity of the method of ascertainment proposed in the second feature. That section refers only to the "liability" recognized, and it indicates the ordinance as the one "in which the method of ascertaining her liability on account of said debt is prescribed," without in any way assenting to or conceding the validity of such method.

Suppose the second feature of the ordinance had prescribed as the method of ascertaining the just proportion that West Virginia should pay one mill on every thousand dollars of the public debt, or that it should pay one mill on every thousand tons of coal shipped from the State, could it be truly contended that the Commonwealth of Virginia had deliberately consented thereto? Yet, as I have endeavored to show, these supposed methods are not one whit more whimsical and fantastic than the method actually proposed, because the difference between the amount that a county has paid into the State treasury,

in a given period in taxes, and the amount that has been expended within that county by legislative appropriations during that period has no more connection with the public debt of the State than the number of tons of coal shipped from such county during such period can have.

There can be no question as to the power of two States, or of two sections of the same State, to enter into compacts within the conditions existing in the cases of *Green v. Biddle*, 8 Wheat., 1, and *Wharton v. Wise*, 153 U. S., 155, or as to the soundness of the rule stated in *Wharton v. Wise*, p. 173:

"The consent of Congress to any agreement or compact between two or more States is sufficiently indicated—when not necessary to be made in advance—by the adoption or approval of proceedings taken under it."

But can it be said that Congress ever saw or considered the Wheeling ordinance or ever knowingly adopted any proceedings taken under it? Congress had before it the constitution which had been framed for the proposed new State, and the act of May 13, 1862, purporting to give the assent of Virginia to the erection of this new State. Nothing appears in the constitution as to this method of ascertaining West Virginia's share of the debt. The provision of the constitution appears in article 8, section 8, and is as follows:

"An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

There it appeared to Congress that adequate provision had been made for the payment of West Virginia's "equitable proportion" by requiring the legislature to ascertain the same, and then provide a sinking fund for its payment.

Can it be supposed, in view of the debates that occurred in Congress on the bill for the admission of West Virginia into the Union, that such bill would have become a law if it had appeared in the constitution under which it sought admission that it proposed to ascertain its equitable proportion of the debt by deducting from the amount of taxes it had paid since the first debt was incurred the amount it had received in the way of legislative appropriations? It gained admission into the Union by the method indicated in its constitution. It

now proposes to fall back on a method which would have defeated its effort to be admitted into the Union.

SECTIONS 5 AND 7 OF ARTICLE 8 OF THE CONSTITUTION.

On pages 18 and 19 of their brief counsel for defendant insist that the words "previous liability" in the 5th section and the words "public debt" in the 7th section do not refer to West Virginia's liability to her equitable proportion of the public debt of the Commonwealth of Virginia.

What other *previous liability* of the new-born State existed besides the public debt of the old State? Many of the States of the Union now provide in their constitutions that no public debt of the State shall be created. But counsel for defendant insist that while the State may be thus prohibited from creating a *public debt*, it is not prohibited from creating a *public liability*, and that when a public liability is created then the legislatures may create a public debt to extinguish the previous liability. It is to be supposed that the court can be favorably impressed by such linguistic jugglery. The liability of West Virginia for a just or equitable proportion of the public debt of Virginia existing previously to the formation of this constitution was recognized by the constitution, and provision was made to meet it. This provision contemplated the issuance of bonds of the new State, but it was intended to leave no room for the creation of any other public debt, and hence it was that in this section 5 of article 8 it was provided that "no debt shall be created by this State except to meet * * * a previous liability of the State," &c. So in section 7 of article 8 it was provided that the legislature may sell all the stocks owned by the State in banks and other corporations, "but the proceeds of such sale shall be applied to the liquidation of the *public debt*," &c. What was *the* public debt?

Note, it is not *a*, or *any* public debt, but *the* public debt. There was and could be but one public debt, and that was the public debt which West Virginia had in common with Virginia, and as part of Virginia previously created.

Counsel argue on page 20 of their brief that because this same provision appears in the later constitution of West Virginia, adopted in 1872, that for that reason it could not have been intended to apply to the public debt of Virginia prior to 1861. It is true that this provision was repeated in several constitutions adopted by West Virginia, as was also section 8 of article 8; but it may be also true that when control of the State passed from the hands of the native-born citizens and into the hands of citizens from other States who had drifted into

West Virginia and had filled all the high offices of the State, then these provisions disappeared from the later-formed constitutions. The reason for such disappearance is not far to seek. Doubtless the hope was indulged that a repudiation by omission of this declaration of liability might soon warrant a repudiation by express disavowal of liability, a stage which, it appears, has now been reached.

Both Virginia and West Virginia in their respective constitutions prohibit the creation of any more public debts. Virginia has learned from experience. West Virginia has taken warning from the example before her. But both States have recognized that it might become needful to issue new bonds in order to extinguish the existing debt which rested upon both of them, and hence it was that each State provided that the prohibition should not extend to "previous liability," referring in each case to their respective liabilities for the existing public debt of the old State.

It is evident that West Virginia now rests her entire defense to the case stated in the bill on the recognition by this court of the Wheeling ordinance as a contract between the States of Virginia and West Virginia and now binding on the Commonwealth of Virginia. On the part of Virginia it is submitted that she had no part or lot in that matter. It surely lacked one essential element of a *contract*; the people who proposed the ordinance, and the people who accepted it were the same people. They did not coexist at the same time as parties to the contract. They contracted with themselves at successive stages of their continuing existence. When West Virginia was created Virginia ceased to be in that territory. True, the governor, who was a citizen of one of the counties of the new State, did not relinquish his titular office of governor of Virginia, but moved his seat of government to Alexandria and remained there within the Federal military lines. He assembled a handful of men, who masqueraded as the General Assembly of Virginia, and then on the 11th of April, 1864, organized a Constitutional Convention of Virginia, and adopted a new constitution for Virginia, the 27th section of which is quoted on page 22 of defendant's brief, by which the Wheeling ordinance was held to have no binding force upon Virginia. It was all a grim farce. But it cannot be denied that they had as much legal right to repudiate its binding force on Virginia as they had in August, 1861, to impart such binding force to it. The existing public debt of Virginia in January, 1861, was \$33,000,000, as admitted in the answer to the bill. This was the debt of West Virginia, or of the counties constituting it, as much as it was of the other counties of Virginia. If the wealth

of West Virginia was equal to one-third of the wealth of the whole Commonwealth of Virginia, then the equitable proportion of that debt to be borne by West Virginia should be \$11,000,000 as of January, 1861, and that amount should now be adjudged to be due by her.

SECTIONS 3, 4, 5, AND 6 OF THE DECREE PROPOSED BY DEFENDANT.

These sections of the decree are also objected on behalf of the complainant on the ground that they seek inquiries into matters that have no apparent connection with the ascertainment of West Virginia's "just proportion" of the public debt of the Commonwealth of Virginia prior to January 1, 1861. The amount of that public debt as of the date named is admitted to be about \$33,000,000. The exact amount is susceptible of ascertainment. The only other question is as to the just proportion to be borne by West Virginia. If the proportion heretofore fixed by Virginia, of one-third, is objected to, then it remains for the court to determine, through its master, or in such other way as it may adopt, what the just proportion is. It has been assumed on the part of Virginia that the evidence relevant to such inquiry, which is altogether documentary, consisting of the public records and files of the Commonwealth of Virginia, could not appropriately be laid before the court at this stage of the cause, but would be produced before the master at such times and in such manner as he might require.

Should it be found that one-third of the public debt is the just proportion to be borne by West Virginia, then any inquiry into the manner in which Virginia has settled with her creditors for the two-thirds of said public debt, assumed by her as her just proportion, can have no relevancy to the inquiry here.

The certificates issued by Virginia represent only the bonds which were surrendered by the creditors and are now held by Virginia in trust for the owners of them; as to the one-third set apart as West Virginia's just proportion of the debt evidenced by such bonds, the bill sets forth with minuteness of detail the amount of such certificates, which has been assembled by the committee representing such bondholders, under the plan adopted for the settlement between Virginia and her creditors and under the acts of the General Assembly of Virginia, all of which appear in pages 39-66 of the bill and exhibits, no part of which appears to be denied by the answer of the defendant.

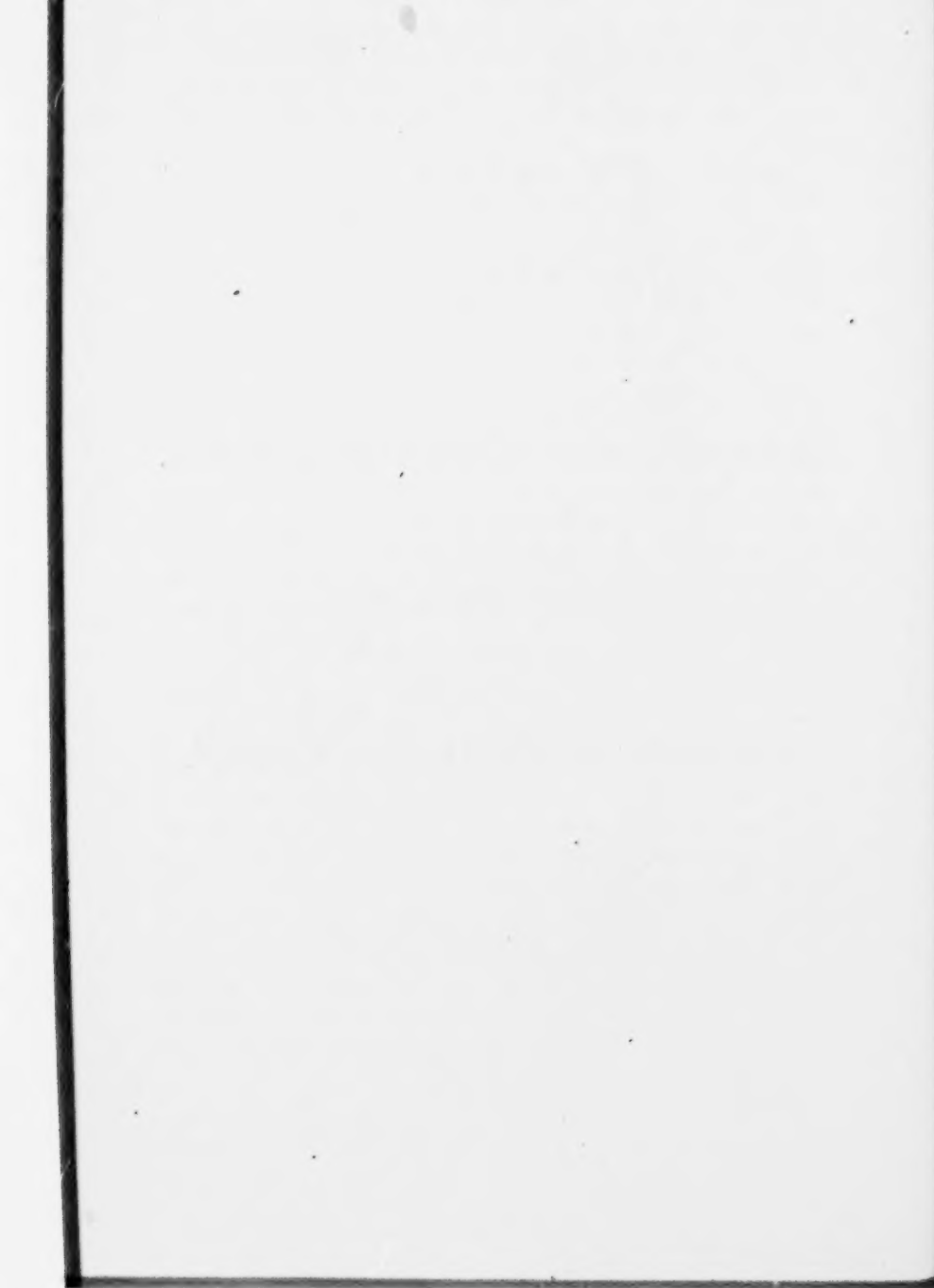
HOLMES CONRAD,

Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Argument of Mr. Holmes Conrad.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

WEST VIRGINIA, *Defendant*.

In Equity—Original No. 4.

ARGUMENT OF MR. HOLMES CONRAD,

For the Complainant.

Mr. Carlisle: If your Honors please, we desire to have some understanding as to the order of this argument. Major Conrad, I understand, appears as *Amicus Curiae*, and we think we have a right, before we are required to address the Court, to hear a statement from the representative of the State itself also. We do not object to Major Conrad opening the case, but there are three arguments on that side and we think two of them ought to precede us, one of the *Amicus Curiae* and the other representing the State.

Mr. Anderson: That is satisfactory to us.

Mr. Conrad: I did not desire to make the first argument; I am not prepared to do it, but it is the wish of counsel that I should do so, and I am not going to shrink from it.

This bill was filed, as your Honors may remember, to have ascertained the just and reasonable contributive share that the State of West Virginia should pay towards the public debt of the Commonwealth of Virginia as of January 1, 1861. That is the object of the bill.

The bill charges that the public debt as of that date was about \$33,000,000; the answer admits that allegation. That fixes a very

important factor in this equation; it leaves open, however, a still more important one. The whole debt is thirty-three millions of dollars; here are two States now who, at one time, formed the one State, that contracted this debt. It is admitted there must be an apportionment, and the question is, How shall this debt be apportioned? How, by what plan or method, shall we ascertain the just contributive share of the State of West Virginia? We are halted at the threshold of this inquiry by a statement from counsel for West Virginia. They say that the plan and method has already been fixed and determined by a contract entered into between the two States. We ask them to show us the evidence of that contract and let us see the terms in which it is stated, and how and where it is expressed, and on the eighth page of their brief, signed by C. W. May, Attorney General, I find an answer to that inquiry, which, in the interest of conciseness and brevity, I venture to read. They speak of the admission, and they say:

“there was a solemn agreement entered into in 1861 between the State of Virginia and the new State of West Virginia, with the consent of the Congress, by which the latter State assumed (as one of the conditions of the assent of Virginia to her becoming a State) a just proportion of the indebtedness of that Commonwealth as it existed prior to January 1st, 1861, the manner of ascertaining which proportion was defined by the ordinance itself.

“The ordinance was, as treated by this Court in the case of *Virginia vs. West Virginia* (11 Wallace, 39), a proposition by the Commonwealth of Virginia to the people of the proposed new State. It was accepted by the constitutional convention of the proposed new State, carried into its Constitution and adopted by the people; and when the State was admitted into the Union by the Congress, with the assent of Virginia, it became a completed compact between competent parties, upon adequate consideration, protected by the Constitution of the United States from impairment by either party.”

With a full sense of the responsibility of such a denial, I deny that either one of those four propositions is true. I deny, and will show, I think, that it never was accepted by the constitutional convention of the proposed new State; it never was carried into its constitution and adopted by the people, and it never was protected by Congress, or considered by Congress when it admitted this State. I say I am fully sensible of the responsibility of a denial so direct to four elements of a contract charged so specifically and concisely as is done in that brief.

I may be asked, what is the Wheeling Ordinance of which so much has, and will be said? Let me very briefly recall to the attention of the Court some dates and facts. After the convention in Richmond had passed its ordinance of secession, about one month later, in May, 1861, a number of persons met in the City of Clarksburg, some of them had been members of the Richmond Convention, I believe, all of them were violently opposed to the course adopted by that convention, and those gentlemen issued notices to all the people of the forty-eight counties lying west of the Alleghenies, inviting them to meet in a convention in the City of Wheeling in June, and they met in convention. This convention, assembled in this way, continued until August, 1861. It adjourned from time to time, took recesses, and on the 20th day of August, 1861, it adopted an ordinance, which I will ask your Honors just briefly to follow me in. You will find it in the appendix to the brief of the Attorney General of Virginia. That ordinance is entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State." That was its object; it was an ordinance that contained eleven sections.

Mr. Justice White: Will you be good enough to give me the page you are reading from?

Mr. Conrad: Page 12 in this appendix.

Mr. Justice McKenna: Which brief is it? I find no appendix in my record.

Mr. Conrad: I find it in the brief of the Attorney General, but it is printed elsewhere in the record. I beg the Court's attention now to the fact that of the eleven sections, ten of them relate purely to the formation, recognition and admission into the Union of a new State. Those are political questions with which the judicial department has nothing to do. Those ten sections, I say, are political questions with which the courts have nothing to do, which could not come before this Court, which could not have been restrained by application to any other court. The ninth section, however, does not present a political question; that presents a question of contractual obligation, that presents the question in which private rights of creditors are concerned and contractual obligations of a State are concerned; that presents a question with which political departments are not competent to deal; that presents justiciable questions, questions that are cognizable only by courts. Now, once for all, let me read that or-

dinance, because I will have occasion frequently to refer to it:

“The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period.”

It is useless to read the balance of it. In other words, that ordinance provides that a clerk should make one column with the taxes paid by those forty-eight counties between 1820 and 1861, and add them up. He should then ascertain what was a fair and reasonable share of the ordinary governmental expenses, during that period, and add it to that column. Then in another column, he should add up all the expenditures made by legislative provision within those forty-eight counties during that period and subtract the one from the other, and that, it is said, would be the just proportion of this debt that West Virginia should bear. I just pause to say that that is a statement that could be made between any county in Louisiana, Kentucky, or Massachusetts, and the State of which it forms a part, if no public debt ever existed at all. That recognizes, or involves, at least the county saying, “I will pay no more taxes, because during the hundred years past the taxes which I have paid exceeded the amount of the legislative provisions which have been expended within my borders.”

That is the contract; but let us see. That convention, having passed that ordinance, and passed some other ordinances, adjourned *sine die*. This ordinance provided for the calling of a convention to frame a constitution for the new State. That election took place on the 24th of October; delegates were elected to this new convention, and the people of the forty-eight counties voted as to whether or not a new State should be erected, and they carried it overwhelmingly, and delegates were elected to the new convention which met on the 26th of November.

It is said, and this is the first proposition that I have denied, that this Wheeling ordinance, or this provision providing for the debt of the new State, was carried into the new constitution. I say that is not true. Why? Because, in the first place, here is the new constitution, and it is not there. The new constitution

does contain a provision looking to the ascertainment of the share that West Virginia should pay, but it is not this provision; it is a wholly different provision. Let me pause just a moment to bring to the attention of the Court—it is very brief—what this provision of the constitution is. I have read the Wheeling ordinance, the 9th section; now, here is the provision of the constitution.

Mr. Justice Holmes: Where is that to be found?

Mr. Conrad: On page 6 of the Attorney General's opening brief. Here is what the constitution says:

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the First day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

There is no provision there, as you will see, about adding up taxes and deducting receipts of legislative provisions, but let us look further. In Section 6 it is provided:

"That the delegates meet in the City of Wheeling on the 26th day of November next and organize themselves into a convention, and the said convention shall submit for ratification or rejection the constitution that may be agreed upon by it to the qualified voters."

That is the first provision under the constitution. In the 8th section it is provided:

"That the Governor shall lay it before the General Assembly when it meets, votes cast in favor of the new State and in favor of the new constitution proposed, and the votes for their adoption."

The tenth section provides:

"When the General Assembly shall give its consent to the formation of such new State, it shall forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the said new State may be admitted into the Union of States."

"The government of the State of Virginia, as reorganized by this convention, shall retain within its territory all of its powers."

Nowhere do we find in that ordinance, any intimation that the

plan proposed by it for ascertaining West Virginia's share of the debt, shall be considered or entertained or acted upon by the constitutional convention. We find that when the constitution was actually produced, when it was framed by this convention, that it contained no provision whatever such as you find in the ninth section of the Wheeling ordinance. These, with the remaining nine sections, which provide for this new convention, all relate to a political question, all relate to the erection of this new State. That went to Congress, that was considered by Congress, but nowhere we find, as is averred, again, in this brief, that Congress ever considered this provision of the payment made in the Wheeling ordinance for ascertaining West Virginia's share of the debt. On the contrary, we find from the debates that the question was asked on the floor of the Senate, "Virginia owes a large debt; what provision has been made for its payment?" And the answer was, "The constitution contains provision for its payment." "What provision is made for ascertaining West Virginia's share?" "The constitution contains the provision that West Virginia shall pay an equitable proportion of the debt," that was the answer made. Suppose that the constitution had contained in its body, in place of the section I have read, this ninth section of the Wheeling ordinance, that West Virginia's share of the debt that had been contracted forty years before, evidenced by bonds outstanding in the hands of holders for value, should be ascertained by adding up all the taxes that she had paid for forty years and deducting from them all the expenditures, all legislative appropriation within that time, and that should be her share? What if the taxes exceeded the appropriations? The creditors would go without any satisfaction of their debt. Would Congress have admitted the State upon a constitution containing that provision? Would Congress have admitted the new State of West Virginia upon any other provision than that which is expressed in the eighth section of the eighth article of the constitution? Would Congress have considered the matter at all favorably if it had been proposed to turn the creditors over to this system of jugglery that was proposed by the ninth section of the Wheeling ordinance? So I venture to say that not only was this not carried into the new constitution, but it was not considered by Congress. I need not stop to call to the attention of this Court the authorities which show conclusively and define the difference between political and judicial questions. *Massachusetts vs. Rhode Island*; *Luther vs.*

Borden; *Georgia vs. Secretary Stanton*. There the Court has pointed out with a fullness that would be vain to define here the classes of cases that fall under the head of political questions, that are cognizable only by a political department; and justiciable questions, those that relate to questions of contractual liabilities and rights with which the political departments cannot intermeddle and which are cognizable alone by the courts

Counsel for West Virginia in their brief, pages 15 and 16, again say, speaking of this new Convention, the convention that framed the constitution, the convention that met in November, say—

“It will be noted that this language of assumption is the language of the ordinance except that word “equitable” is used in the Constitution, while the word “just” is used in the ordinance.”

Again:

“It will be remembered that this convention assembled within ninety days after the adoption of the Ordinance. Its sole warrant for assembling was the ordinance. Its authority to frame the Constitution was derived from the ordinance. The ordinance as a whole was a proposition to that Convention and, as a whole, was accepted by the Convention. The Convention complied with all the provisions of the Ordinance. The constitution was framed to meet all the requirements of the Ordinance. It was the basis of the Constitution.”

Then, on the next page:

“If the Convention had failed to comply, in the Constitution, with the requirements of the Ordinance, or had departed in any way from the conditions of Virginia’s assent, as stated in the Ordinance, its work would have been nugatory. It was bound by the ordinance to carry into the Constitution the assumption by the new State of an equitable proportion of the indebtedness of Virginia prior to January 1st, 1861.”

That statement means this, as I understand it, that the convention that framed the Wheeling ordinance, not only had the power to prescribe, but it did prescribe to the convention which it authorized to assemble, the duties which it was to perform. That it prescribed for it the constitution, it prescribed for it this provision, the ascertainment of West Virginia’s share; it provided for the matter of the payment of the debt, and the argument is that if the convention of November that framed the constitution had departed to the extent of an iota from the

prescription of the previous convention, its work would have been nugatory.

There is a discussion between what are called "revolutionary conventions" and "constitutional conventions." It has long been a question how far a convention called for one purpose may exceed that purpose and originate work not contemplated. But the practical question is, "What would happen if it did do it?" The courts take cognizance of it; in one instance, in Pennsylvania they did, where it related to matters of personal liability and contract. But suppose a convention met, called it may be, for one specific object, and being assembled, it went over the limits prescribed for it and made other provisions constitutional, which went into effect; would they, as this brief says, be nullities? If that is true, then all the operations at this convention were nullities, because this very convention, of November 26, actually changed the name of the State. You will find from this ordinance that the new convention was called in November to frame a constitution for the State of *Kanawha*; it is prescribed, actually, that they shall frame a constitution for the State of *Kanawha*, but yet, when they met there somebody says, "I do not like the name of *Kanawha*; let us be *West Virginia*." An objection was made. "You cannot do it, because we were sent here to frame a constitution for *Kanawha*;" but they did. They did it, and it is *West Virginia* to-day. Nowhere do you find in this convention that met in November, nowhere do you find in the fruit that came from it, any recognition of a power in the preceding convention to limit it to any specific work. They were told to frame a constitution and they did it; they were not told to frame a constitution with certain prescribed provisions in it; they were not told to frame a constitution incorporating in it the ninth section of the Wheeling ordinance looking to the ascertainment of *West Virginia's* share. We recognize the fact that if a convention sends out a constitution to be submitted to the people, and sends out, as a part of it, an ordinance, and provides that that ordinance shall be submitted to the people, that that ordinance is a part of the constitution; but where a convention adopts a series of ordinances which are nothing on earth but resolutions, nothing but such resolutions as may be adopted in a legislature; when a convention does that, and at the same time frames a constitution, the ordinances are not correlated to the constitution unless in terms they are appended to it and submitted to the people. Here we find that while this convention in August did adopt an ordinance that provided for the plan, and while under that ordinance the convention to adopt a

constitution was formed and assembled, yet, where this first convention incorporated, among its political articles, one of a contractual nature relating to rights of property which was beyond its competency to deal with, you will find that the convention that met in November ignored and disregarded it, and adopted a provision of its own which is wholly different, essentially different.

It will be said, and it has been said, that this Court has decided upon the validity of the Wheeling ordinance on the demurrer. I need not argue to this Court what it has decided and what it has not; it could not decide upon the validity of the ordinance upon the demurrer. The Court did say on demurrer, in answer to a suggestion made by counsel, that there was a compact by which the legislature of West Virginia was made the sole arbiter of the fact and the amount of the debt; the Court did say that. I can reconcile that; I find that the Act of May 13, 1862, provides that it consents to this new State upon the provisions of the constitution prepared by the convention. I look at the provision of the constitution, and I find it says the legislature shall settle the debt. That may be the reference to this Wheeling ordinance referred to by the Court when it says the legislature shall ascertain the amount. It meant ascertain it according to the provision of the constitution, but that was on a demurrer; to the case stated on the face of the bill; that did not deprive the plaintiff here of the right of coming in and showing that the Wheeling ordinance was invalid, that the Wheeling ordinance had no life, no vitality, could not be recognized or enforced by the courts. On the face of the bill on the demurrer it was taken to be true.

The whole argument here is, that here was a contract, here a proposition it is said, was made by the State of Virginia. We propose to you this Wheeling ordinance with all of its provisions, and it is said that West Virginia has accepted it. Consent? Yes, to be sure. These men stood up on one side of a hall and said, "We propose to you this ordinance," and then they marched across the hall and faced about and said, "We accept the proposition that you have submitted to us." They were the same people, were they not? This whole matter came before Mr. Lincoln's Cabinet and himself, and their views are expressed. The Cabinet stood three to three, six of them expressed views on the question. Will you pardon me if I call your attention to just one word that was spoken by the Attorney General there, Mr. Edward Bates, on this subject? I am reading from a work that is called "The Rending of Virginia." It is an apology, really, for the existence of West Virginia. It contains a vast deal of historical mat-

ter relating to its early history. I have examined seven histories, the names of which I have here, and none of them gives the information that this does.

Mr. Justice White: What is that book called?

Mr. Conrad: "The Rending of Virginia," by Hall. It is not in the Congressional Library; at least, they did not furnish it to me the other day. I do not know where it is published, the name is not given. Here is what Mr. Edward Bates, the Attorney General, said upon this very question of the people who made the proposal and the people who accepted it:

"And the Legislature which pretends to give the consent of Virginia to her own dismemberment is (I am credibly informed) composed chiefly if not entirely of men who represent those forty-eight counties which constitute the new State of West Virginia. The act of consent is less in the nature of a law than of a contract. It is a grant of power; an agreement to be divided. And who made the agreement? The representatives of the forty-eight counties with themselves. Is that fair dealing? Is that honest legislation? Is that a legitimate exercise of a constitutional power by the legislature of Virginia? It seems to me that it is a mere abuse, nothing less than an attempted secession, hardly valid under the flimsy forms of law."

Do not understand me as questioning the validity of the State of West Virginia. It is as firmly intrenched as any State in the Union, but here it is proposed to carry the consent beyond the mere political question, beyond the matter of consent to the erection of the State, carry it into a consent for the validity of the adoption of this ninth section of the Wheeling ordinance.

There have been some great men in this State of West Virginia, the greatest land lawyers, as we call them, we ever had in the old commonwealth lived on that side of the mountains. Some have survived. Mr. Charles James Faulkner, sometime Minister to France, who represented for many years the West Virginia District in Congress, closely identified in sympathy, in interest, in every way, with that State, was a lawyer of great eminence, a statesman of wide experience, and in 1884 his opinion was asked as to the liability of his State, West Virginia, on this debt, and especially under the Wheeling ordinance, and it may not be improper, with the Court's indulgence, for me to read just a line or two of it. It is a public document, dated March 29, 1884. He says he does not think the State of West Virginia ought to pay more than one million dollars. He was the counsel for West Virginia in the case in 11th Wallace. He was

the counsel for the prevailing side in the case of the State of Virginia v. West Virginia, for the two counties of Jefferson and Berkeley. He made the prevailing argument in that case. Here is what he said:

"After a careful examination of the case of Virginia v. West Virginia, I cannot perceive that the Court attaches any peculiar legal efficacy to the ordinance of August, 1861. It is true it referred to that ordinance historically, but only for the purpose of showing that even at that early period of our history the counties of Berkeley and Jefferson were contemplated as possible additions to the State of West Virginia. My reasons for supposing that the Court might not regard the ordinance of August, 1861"—

(that is, the Wheeling ordinance—)

"as prescribing a binding rule for the settlement of the debt are, that by the subsequent constitution framed and adopted by the people of West Virginia, this basis of settlement is abandoned, and we are then made to assume an equitable proportion of the public debt of Virginia prior to January 1, 1861, and the legislature is directed to ascertain the same as soon as practicable. Virginia, in giving her consent to the formation of the new State in May, 1862, expressly does so upon the provisions set forth in the constitution of West Virginia. Upon these terms we were admitted by Congress as a State of the Union, and the constitution of 1863, thus ratified by the two States and by Congress, would be more likely to be taken as the basis of the contract than the effete ordinance of August, 1861."

These are not the loose words of an idle man. This is not the unconsidered opinion of a county court lawyer. Here is the opinion of a statesman who was deeply and nearly concerned in the existence of this State, who had maintained at this bar the argument by which he induced the Court, as formerly constituted, to hold the validity of the transfer of those two counties of Jefferson and Berkeley. But why need we go into that? The great ordinance of 1787, which Mr. Webster said, was prepared by Nathan Dane, provided that slavery should not exist anywhere within the limits of the territory embraced within it and that lay at the very foundation of all the States that should be carved thereafter out of that territory. It seemed to permeate and enter into the very foundation upon which all subsequent States could be built; it was a corner stone. "Slavery shall not exist," and yet, when the State of Ohio was admitted into the Union and sent her constitution to Congress, it contained a provision recognizing and allowing slavery, and an objection was made, "Why, this is diametrically opposite to the inhibition of the northwest ordinance."

This Court said, in *Strawder v. Graham*, in 10th Howard, "The State comes in under the provisions of its own constitution; you cannot look outside of it; you cannot look behind it; you cannot look to what preceded it. This is the final, ultimate expression of its civil and political rights and powers." So, here we have this ordinance that was merged in the constitution framed by a wholly different convention, a constitution that was framed three months later, that was voted upon by the people without reference to that ordinance, that was sent to Congress and there adopted, not upon the ordinance, but upon the constitution that was framed, and I submit, as I have indicated before, that it is reasonable to suppose that if this provision which we find now in the Wheeling ordinance for ascertaining West Virginia's share, had appeared in the constitution that the State never would have been admitted upon the constitution that contained it.

It was argued here on the demurrer that another contract existed than the contract to which I have referred. It was said that the constitution, not the ordinance, but the constitution had provided that the legislature of West Virginia should settle this debt as soon as practicable, and that Virginia, by the Act of May 13, 1862, had consented to it according to the provisions of the constitution, and it was argued that from that contract or compact the legislature of West Virginia was made an arbiter. That argument seems to be implied somewhat in the present brief of the counsel for West Virginia. I will pause only to suggest this, that if you find that to be a compact, if you find that the constitution and the Act of the Assembly does actually make a compact binding on these States, enforce it according to its terms. Its terms were that the Legislature must ascertain this "as soon as may be practicable," and that was nearly a half a century ago. Time was evidently made essential. It was not that "the legislature may do it at sometime," but "it must do it as soon as practicable." Time was made of the essence by the very terms of it, and yet I say that nearly half a century has passed and not one step has been taken on the part of West Virginia towards the ascertainment of her just share.

I have had to omit quite a number of views that I intended to present. But one I will present in closing. If we repel the Wheeling ordinance, if the Court finds that the Wheeling ordinance is illusory and impracticable, and that it never formed a part of any contract between the two States, that it never has been agreed upon as the basis for the ascertainment of West

Virginia's share, then where shall we look for a plan, what basis or method shall we adopt? We have stated that the amount of this debt has been practically agreed upon, thirty-three millions of dollars. It is proposed to go into the question here, of how much of it was spent in one State and how much of it was spent in the other State and strike a balance. Can you do that? Would it be just to do that? Suppose that the legislatures of Virginia from 1820 to 1861 had expended the whole thirty-three million dollars in the City of Wheeling, out in the northwest; who could question their right? They were there from every county in Virginia, senators, delegates, representing the people of the entire State. That legislature was the sole repository of power and the sole repository of discretion as to the expenditure of this money. Suppose, as I say, they had spent the whole thirty-three million dollars in the City of Wheeling, would it be just and fair now to say to the City of Wheeling, "You must account for that?" Could not Wheeling say "It was not done by me, by my power; it was done by all the people of Virginia through its legislature?" You cannot say, because this money has been poured into one place, that it was intended to benefit that one place, or that it has done it. Aesop, twenty centuries ago, showed that when complaint was made against the belly that it was idle, that it consumed all the food, and the eyes and the ears and the hands said it must stop, it did stop, and the eye grew dim and the natural force of man abated, and all his members were threatened with atrophy, until the belly said, "It is through the subtle alchemy of nature that the strength on which you live is conveyed to you by all the channels of your body from the food which I digest." And is it not true so of the body corporate and politic? Can you, when a legislature, the sole body clothed with power, puts all the money in one place, Norfolk or Wheeling, can you say it was done there for the benefit of that locality? Over in the State of Virginia, in the county of Albemarle, is a tunnel. When it was built it was said to be the longest in the world, through the Blue Ridge Mountains. It cost a million and a half of money, I believe. Would it be fair, in some adjustment of this sort, to say to that county, "You shall be charged with this." Might it not with propriety say, "It is of no benefit to me; it was put here for the good of the whole body of the State?" Can one section of a State say "There is no railroad constructed through this tier of counties, and I should be relieved from a portion of the public taxation," or "I should not be called upon to contribute to a public debt?" Would not the re-

ply be that "While it is there, it is there for your local benefit, yet it is not there for your local benefit alone; it was put there because, in the wisdom of the legislature, the whole body politic was benefited by that local application." So, I venture to suggest that it would not be fair to enter into any account, charging up improvements, as they are called, on one side, against improvements on the other. Much less would it be fair, when you find, as is charged in this bill, that the representatives in the legislature from West Virginia, these forty-eight counties, to a man voted for this debt through forty years, voted for every appropriation, while the Eastern Virginia people to a large extent voted against it. It would not be fair to yield to this suggestion of settlement, when you find the Chesapeake and Ohio Railroad, just as an illustration, was constructed up to the West Virginia line and then stopped, either by the secession of Virginia from the Union, or by the secession of West Virginia from Virginia, it would not be fair, I say, to say to Virginia, "You are chargeable with all that because all that is in your territory." We say, "It never would have been there if the debt had not been created; the debt would never have been created if you had not insisted upon it; it would never have been created at all if the legislature of Virginia, in its entirety, looking to the interests of the whole State, had not thought it best to construct this road, not to the limit where it is now stopped, but construct it through to the Ohio River, the point to which it was originally destined. I say it would not be fair and equal to halt now and say that the account must embrace all the works unfinished on the Virginia side, and not one dollar of their expenses of construction charged to West Virginia because they are not extended into or through her. They never would have been constructed but for the fact charged in this bill that the mineral wealth was west of the Alleghany Mountains, that all of these railroads, canals, turnpikes, bridges, were built with a view to the development of that wealth; they would not have been built but for West Virginia; they would not have been begun, and not a dollar of debt would have been created, but for the development of that State and of those mineral resources, and it does not come with any show of fairness, just now, for that State to say, "Because, in the Providence of God, there has been a dissolution before these works reached our limits, came into our territory, therefore we are not to be charged with them." I say that it was on account of the whole body politic that these works were begun and this debt created; that its primary object was the development of those improvements, not for the benefit of West Vir-

ginia, I do not pretend, but for the benefit and welfare of the whole Commonwealth of the State.

What is the wealth of West Virginia? How would you settle it? How does the wealth today, how does the revenue producing wealth to-day, compare with that of Virginia? It has been suggested here that when this debt was created there was no wealth in West Virginia. The Almighty had put the wealth there before man was, the gas and the oil and the lumber and the coal were there; that was the incentive to all these enterprises; that was the incentive to all the creation of this debt, and now to-day, when development has occurred, compare the revenues of Virginia with those of West Virginia. All that would have been the tax producing basis with which the Commonwealth of Virginia could have liquidated all this debt. That was what she had an eye to when the debt was created. "I am taking upon my shoulders an enormous debt now, but the time will come when we will develop these mines of hidden wealth, and from that will come a revenue by taxation that will liquidate the debt and remove the burden, and the welfare of the people of the Commonwealth of Virginia will be secured forever. It is proposed to ignore that now, and look at this thing as it stands to-day.

Ah, your Honors, how did it look when Congress was appealed to to create this State; how did it appear then? We have in the records here the arguments that were addressed by the senator from Virginia, senators representing Virginia, John S. Carlile and Waitman T. Willey; they were the senators in Congress when this State was created. John S. Carlile, who had contributed to the procreation of this State, stood by the bedside ready to destroy it upon its birth. He opposed it in the Senate. The Legislature requested him to resign, but Waitman T. Willey remained, and Waitman T. Willey, a Senator, urged the Senate, as a reason why this State should be created:

"Here is an opportunity presented to the Senate to erect northwestern Virginia into a free State, a condition for which she was designed by the God of nature—the richest portion of this broad land in mineral resources—with inexhaustible marble quarries equal to those of Egypt and very similar; rich in inexhaustible fountains of salt and oil, and forests exceeding any of those that ever waved upon Mount Lebanon itself, that have remained from the foundation of the government of the State of Virginia, undeveloped, useless, valueless, simply because we have not been able to organize improvements within and under the control of the western section."

Again he says:

"This new proposed State contains within its towering hills and mountains' treasures richer perhaps than can be found within the limits of any other state within this Confederacy, and there they have lain ever since the establishment of this Government, undeveloped, unworked, valueless, and they must continue to remain so unless a different policy is pursued."

That was an argument presented to the Senate for the erection of this State, the enormous wealth that was there. That wealth had not been overlooked by Virginia. Since 1820 this debt had been gradually increasing by legislative enactment solely for the benefit of this defendant.

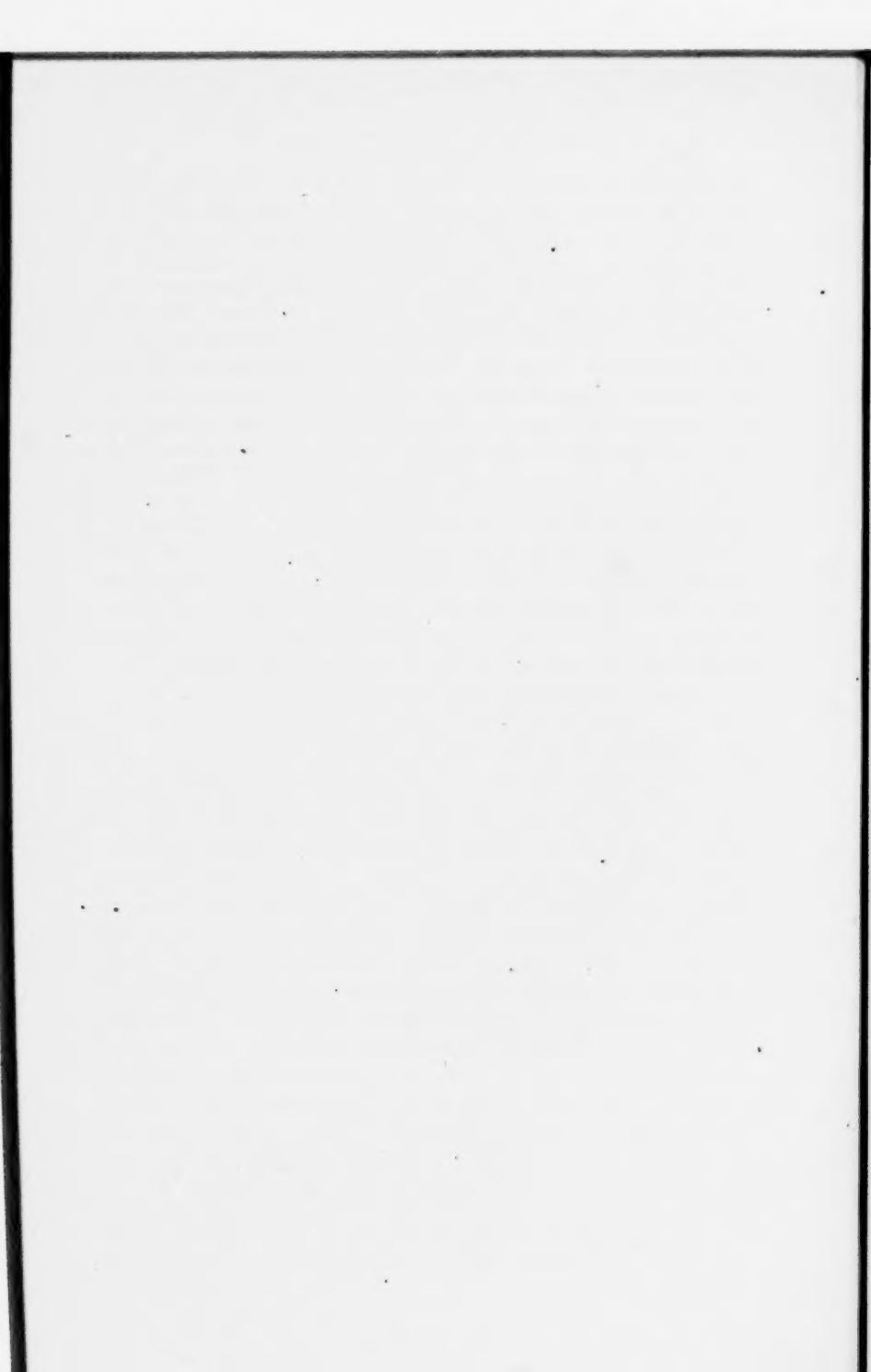
Let me make one suggestion to the Court. I do not know with what pride I can make it, but if anybody supposes that the creation of West Virginia was the offspring of what was called "loyalty," that it was an effort on the part of loyal men to get away from secession, if anybody imagines that, I pray you let me read you just a few words from this same Senator Willey. He says:

"Mr. President, I desire to correct a misapprehension which I find is prevalent, not only throughout the country, but also here. It seems to be supposed that this movement for a new State has been conceived since the breaking out of the rebellion and was a consequence of it; that it grew out of the abhorrence with which loyal citizens of West Virginia regarded the traitorous proceedings of the conspirators east of the Alleghenies, and that the effort was prompted simply by the desire to dissolve the connection between the loyal and the disloyal sections of the State. Not so, sir. The question of dividing the State of Virginia, either by the Blue Ridge Mountains or by the Alleghanies, has been mooted for fifty years; it has frequently been agitated with such vehemence as to threaten the public peace."

Again, at a later date, he repeats it, and he says that representing the voice of Virginia he asked for freedom, he asked for severance from the eastern section of the State, "to which we have been in bondage for fifty or sixty years."

I bring this to the attention of the Court to remove an impression that may possibly exist and may insensibly control, even an enlightened judicial mind, that here was the result of a war, here was the result of men who were making a great sacrifice for conscience sake, and that burden must not be placed too heavily upon them. I want to call your attention to the historical fact, that these men were not moved, as the Senator says, by any considerations of secession or

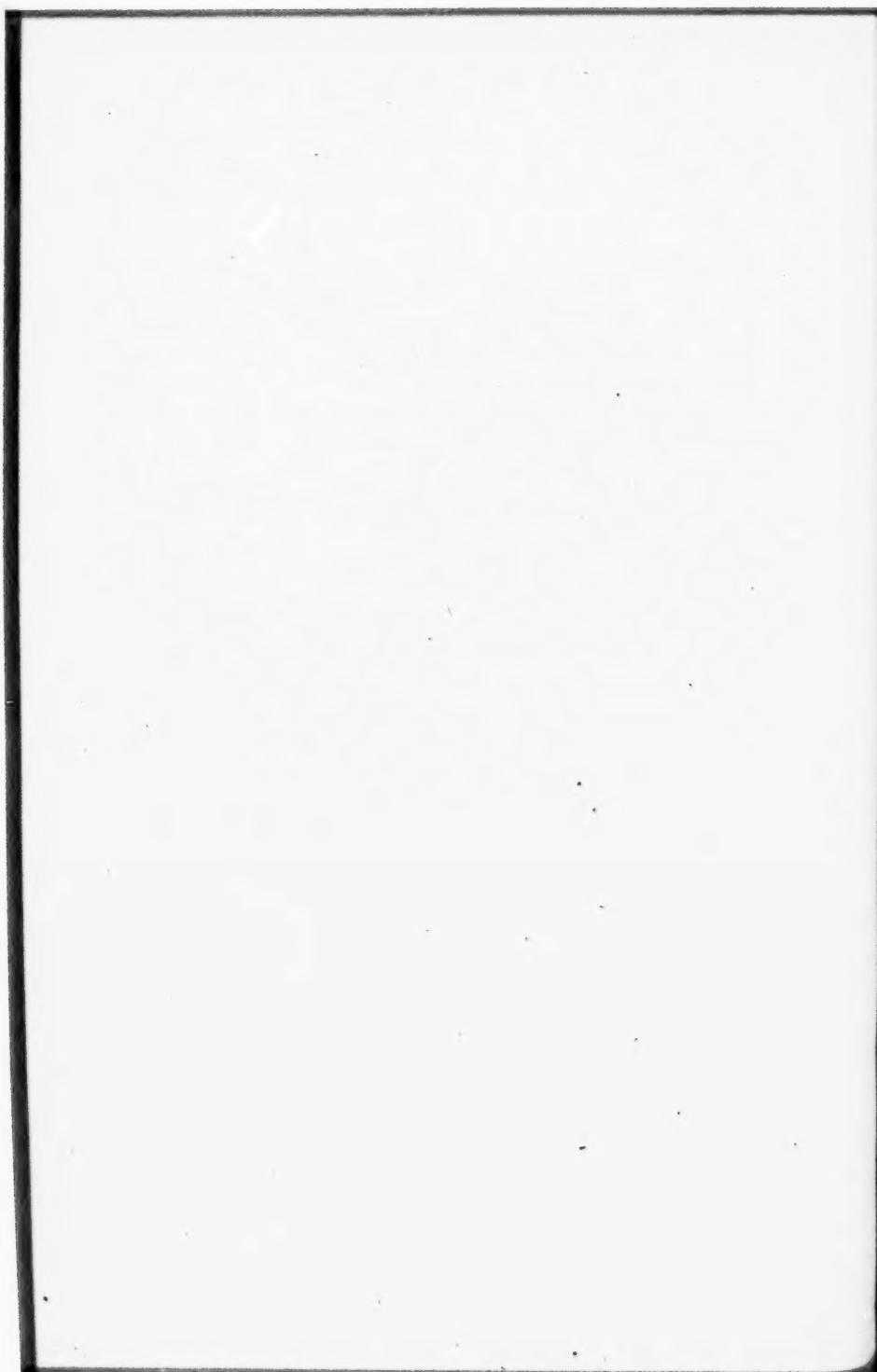
non-secession, or loyalty or disloyalty, but they were seizing hold here of an occasion that was passing to realize hopes that had been cherished for sixty years; they were taking advantage of a condition of war, when the voices of the laws were silenced by the clangor of arms; they were taking advantage of that to gratify the expectations and desires and the efforts of half a century, and now, when they have done it, in view of all the legislation that has taken place, in view of the objects of that legislation, in view of the wealth that they have, in view of the fact that they themselves went away from us, seceded, as Attorney General Bates said, seceded, and thereby prevented the execution of these works of internal improvement, it does not do to come now and say that they shall not be called on to contribute because none of these works had as yet been extended into their territory. It does not do for West Virginia to come and say, now, that we must be content to take the difference between the taxes that she had paid forty years and moneys that have been expended in her limits during that period by legislative appropriation. If she could say that, she could say that her share was one mill on every thousand tons of coal carried through the State; she could have said that her share should be \$500. Consent to such contract? Who are these people contracting? The State of Virginia and the State of West Virginia. What are they contracting about? They are contracting in order to see how little of a debt one part of them should pay, West Virginia. Who is interested? The bond holders and the creditors. Are they present consenting? No. The two debtors are together here entering into an agreement to defraud the creditors, impair the obligation of their contracts, their bonds, bonds that were issued upon an implied covenant that they should be repaid from the revenues of the State, and they come before this Court and present that contract, and they ask you to enforce it, a contract which, on its face, undisguisedly, if it had any validity or force, was designed to weaken, impair, destroy the obligation of the bonds which the Commonwealth of Virginia had issued.



Supreme Court of the United States.

OCTOBER TERM, 1907.

Argument of Mr. Randolph Harrison.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA,

vs.

STATE OF WEST VIRGINIA.

ARGUMENT OF MR. RANDOLPH HARRISON
For the Plaintiff.

Mr. Harrison: If the Court please, the relief which the State of Virginia seeks in this proceeding is the equitable share of the debt of Virginia proper to be borne by West Virginia. West Virginia assumed an equitable proportion of this debt, but she has refused to recognize her obligation, and the object of this suit is to compel her to comply with that obligation. If an equitable result is attained, the method by which it is done would not be material. But as the method by which her proportion of this debt shall be ascertained may have a material bearing upon the result reached, it is important to determine the principles upon which the account between the two States shall be settled.

The Wheeling ordinance undertook to prescribe the method by which West Virginia's portion of this debt should be ascertained. If the Court should be of the opinion that the method prescribed by that ordinance is binding upon Virginia (as contended for by counsel for West Virginia) it will be important to construe its terms. If Virginia is not concluded by the plan of settlement prescribed by that instrument, the debt should be ratably apportioned according to the principles of public law and equity.

The partition of Virginia, whatever the facts may be as to how it was accomplished, has assumed the forms of consent.

Mr. Justice White: What do you mean by "has assumed the forms of consent?"

Mr. Harrison: I mean that the enactments of the so-called State of Virginia, under which her territory was divided and the State of West Virginia was created, have been recognized by all the departments of the government, as the work of Virginia. The Wheeling ordinance, which provided for the formation of the new State, was adopted on the 20th of August, 1861, by a body of men who *assumed* to represent Virginia, and who declared, in the preamble of that instrument, that it was "adopted by the people of Virginia in convention assembled." The same body of men masqueraded one day as a Virginia convention, bestowing her territory, and the next day as the representatives of the prospective State of West Virginia, receiving what they had bestowed upon themselves. In November, 1861, they framed a constitution for the new State, and substantially the same body, in May, 1862, *assuming* to act as the Legislature of Virginia, passed an Act giving Virginia's consent to the formation of the new State out of her territory, under the terms of the constitution which they had framed in the previous November. Thus these people successfully went through the *forms* of giving Virginia's consent to what was done. These forms have been recognized and acted upon by all the departments of the government as effective and binding upon Virginia, and this Court, in over-ruling the demurrer to the bill in this case, seemed to indicate an opinion that West Virginia's proportion of the debt of Virginia must be ascertained by the pursuit of the method prescribed by the Wheeling ordinance. It is due to candor to say that the decision of the Court upon the demurrer seemed to me to convey this intimation. For this reason I wish to consider the terms of that ordinance. Before passing to that subject, however, I submit that if Virginia is not shut up to the plan of settlement prescribed by the Wheeling ordinance, the portion of the debt to be borne by West Virginia should be ascertained according to the principles of equity and justice—that is to say, the debt should be ratably apportioned between the two States. Virginia is interested only in having an equitable proportion of this debt assigned to West Virginia. Any method prescribed, that does not reach that result, to that extent relieves West Virginia of the obligation which she assumed. The Wheeling ordinance is not only an illogical, but it seems on its face to be an inequitable method of apportioning the debt. The

method prescribed has no proper relation to the debt; the account under it can be stated without regard to it, and the amount of the debt would have no influence upon the result. The ordinance contemplates a balancing of accounts between two sections of the old State by charging West Virginia with a just proportion of the ordinary expenses of the State government, and with the expenditures made within the limits of her territory, and deducting therefrom the aggregate amount of taxes paid into the treasury of Virginia during a given period, the balance so ascertained to constitute West Virginia's share of the debt.

Mr. Justice Harlan: Are you alluding now to Section nine?

Mr. Harrison: Yes sir, Section nine of the Wheeling ordinance, is the only section in that instrument which relates to the debt. That section is as follows:

"Section 9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia."

On its face this provision seems not only illogical but inequitable—yet, properly construed and applied it may lead to an equitable result. I am not prepared in advance to say that such would not be the case. Examining this provision in detail, we find its primary stipulation to be:

"The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861."

That defines the obligation which West Virginia was to assume, and is the avowed purpose of the provision.

Then it is provided that this "just proportion" shall be ascertained (1) "by charging to it all the State expenditures within the limits thereof."

Mr. Justice Harlan: "Thereof;" what does that mean?

Mr. Harrison: "Thereof" means the new State—within the

limits of the new State. A question which arises on the threshold is what disbursements shall be included by the phrase "State expenditures." The Court, in advance, might not be able to make any declaration on that subject. Proceeding, the ordinance prescribed (2) "and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted."

What expenses shall be deemed "ordinary" as distinguished from "extraordinary" expenses of the State government? It will not only be necessary to determine what expenses will be classified as ordinary, as distinguished from extraordinary expenses, but it will also be necessary to determine what proportion of the ordinary expenses shall be considered a "just proportion" for West Virginia to bear. On what basis can this "just proportion" be ascertained? Will it be on the basis of the relative population of the two sections, and if so, of the population exclusive of slaves; or, on the relative amount of property in each section; or on the relative cost of government in each section? These are important questions, the decision of which will have a material bearing on the final result. (3) Having ascertained these two items of charge, the ordinance provides that there shall be deducted therefrom the "moneys paid into the treasury of the Commonwealth from the counties included within the said new State during said period;" the balance so found to constitute West Virginia's proportion of the debt as of January 1st, 1861. (4) Then again, it will be necessary to determine the time during which any part of the debt was contracted, because the statement of the account is confined to the period "since any part of said debt was contracted." There will be, I presume, no difficulty on this point, as I think it is conceded that the period began about the year 1820.

A further question to be determined in construing the Wheeling ordinance, is whether the balance ascertained and adjudged to be West Virginia's proportion of the debt shall bear interest, and if so, from what period, and during what time.

Another question is whether the property interests and credits, transferred to West Virginia under the Act of the Restored Government of Virginia, passed February 3rd, 1863, and which was not covered by "State expenditures," as specified in the Wheeling ordinance, shall be accounted for in the settlement to be had with Virginia.

If the Wheeling ordinance is construed according to the contention of the distinguished gentlemen who appear for West Vir-

ginia, it would relieve that State of all liability. While they admit that West Virginia did assume a just proportion of the debt of Virginia, it is claimed in the pleadings and in the argument, that she will be relieved of that liability because of the method prescribed of ascertaining it. In the Answer of West Virginia it is claimed that if the debt is apportioned in pursuance of the plan prescribed by the Wheeling ordinance, it will result not only in absolving her from all liability, but will bring Virginia in debt to her in the sum of \$560,000; and complaint is made in the answer that Virginia has refused to accept this settlement. West Virginia's view of her liability has also been shown in numerous Acts of her Legislature, which she has filed as exhibits in this case, and in which she solemnly denied any liability to Virginia. Beginning with the year 1895, and continuously since, at every session of her Legislature, resolutions have been adopted ignoring and repudiating her liability for any part of the debt of Virginia. It will be sufficient to quote one or two of these resolutions as specimens:

“Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that West Virginia does not owe one cent of the so-called ‘Virginia debt,’ and that this Legislature is opposed to any negotiations on that subject.” Adopted January 21st, 1897.

“Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this Legislature is opposed to any negotiations whatsoever on the subject. And *further*, that this Legislature declines and most emphatically refuses to take any action in regard to what is known as the old Virginia debt, or Virginia Deferred Certificates, either by the consideration of a proposition of adjustment for settlement, or by authorizing the appointment of any committee, or committees, having for their object or purpose the consideration of same; and that it is the sense of this Legislature that the State of West Virginia is in no way or manner obligated, either morally or legally, for the payment of any portion of the said debt, or certificates. Nor do we owe any other State, or territory in this Union.” Adopted January 21st, 1903.

In the oral argument of this case on demurrer one of the members of the Court addressed the following questions to Professor Hogg, who appeared for West Virginia:

Mr. Justice Harlan: Does West Virginia admit that she owes anything?

Mr. Hogg: West Virginia has expressed herself in her Legislature as, on the basis adopted, owing nothing.

The "basis adopted" referred to here, is the method prescribed by the Wheeling ordinance.

Mr. Justice Harlan: Does she admit that she owes anything on any account?

Mr. Hogg: West Virginia disclaims any liability to Virginia on any account. Printed record pp. 281-2.

Notwithstanding, therefore, that West Virginia undertook to bear a just proportion of the debt of Virginia, her position before this Court is that the method prescribed for its ascertainment will not only relieve her of that obligation, but will bring Virginia in debt to her. If that is true, then the method prescribed was a sham designed to conceal her real intentions, and to perpetrate a gross fraud upon Virginia, her helpless victim. If such is the effect of the Wheeling ordinance, it is competent for this Court to strip from her the mask that has concealed her real intentions, and substitute for the method prescribed, a plan of settlement that will make her action square with good faith and the dictates of common honesty.

(At two o'clock P. M., a recess until 2:30 P. M.)

AFTER RECESS, 2:30 P. M.

Mr. Chief Justice Fuller: Judge Day is unfortunately absent today, and I wish to vouch him into this case.

Mr. Spooner: We are perfectly willing, if your Honors please.

Mr. Harrison: If your Honors please, I pointed out just before the recess that the construction of the Wheeling ordinance contended for by West Virginia will not only relieve her of all liability, but will make Virginia her debtor. If that be true, then such a method of stating the account cannot receive the sanction of a court of conscience. The contention of Virginia is that if the Wheeling ordinance constitutes a compact, or agreement prescribing the method of ascertaining West Virginia's portion of the debt, it should be so construed as to lead to an equitable result, and not to an unconscionable result, as is contended for by West Virginia. To that end one of the propositions for which we contend is that whatever balance may be ascertained under that ordinance to be due by West Virginia, shall

bear interest. West Virginia contends that she is not liable for interest.

Mr. Justice White: Before you come to the question of interest you want to come to the question of principal, and you say that under the agreement as written you would owe?

Mr. Harrison: I say that West Virginia contends that under the agreement we would owe.

Mr. Justice White: Before you come to the question of interest, what do you say is your construction of the Wheeling ordinance? The interest is very immaterial unless you settle how the principal is to be arrived at.

Mr. Harrison: The principal is to be gotten at in accordance with the method prescribed by the Wheeling ordinance, if that is taken as the basis of settlement (1) by charging the new State with all State expenditures within her limits; and (2) with a just proportion of the ordinary expenses of the State government since any part of the debt was contracted; and then from the aggregate of those two items is to be deducted the moneys paid into the treasury of Virginia from the counties included within the new State during said period, the result to constitute the principal to be assumed by West Virginia. The method prescribed is arbitrary and a departure from the settled rules that govern in the apportionment of a debt in such a case, and a statement of the account would involve an exhaustive examination of records, documents and vouchers extending back over a period of eighty years. State expenditures would doubtless include public expenditures for internal improvements, but whatever may be included within the phrase "State expenditures" must be charged against West Virginia. She is also to be charged with a just proportion of the ordinary expenses of the State government during the period within which the debt was contracted, down to January 1st, 1861. It is material to determine what constitute ordinary expenses, as distinguished from extraordinary expenses, and then it is necessary to determine what would be a just proportion for West Virginia to bear. The ordinance does not prescribe the basis of ascertaining this just proportion. Counsel for West Virginia ask that it may be ascertained on the basis of population. If population is to be taken as the basis, I submit that slaves should be excluded.

Mr. Justice Harlan: Why not on the basis of voters, three-fifths?

Mr. Harrison: That might be proper; that basis prevailed to some extent in Virginia. But slaves constituted no part of the body politic; they did not vote, or participate in creating the debt, or in expending it; they contributed nothing in the way of taxes, but were themselves, property subject to taxation. If, therefore, population should be taken as the criterion for determining West Virginia's just proportion of the ordinary expenses of the State government, it should be exclusive of slaves. Her just proportion might be ascertained on the basis of property, or on the basis of the cost of government in each section, but I submit that if the view advanced by the other side is adopted, and population be taken as the basis, that it be population exclusive of slaves. Having ascertained the amount in pursuance of the method prescribed, which shall constitute West Virginia's share of the debt, I submit that it should bear interest as of January 1st, 1861, the date arbitrarily fixed by West Virginia. It is contended by counsel for West Virginia that she would not be liable for interest. If not, then the result might be so inadequate as to shock the moral sense and come near leading to the result for which she contends; but if she is made to pay interest on whatever balance may be so ascertained, the result would be very different. I think the Wheeling ordinance would put upon West Virginia liability for interest. If it is a contract, it is a Virginia contract. It was made by a body of men, who, when the admission of West Virginia was under consideration, were characterized on the floor of Congress as a mass meeting, or a mob. But nevertheless they acted in the name of Virginia and made the contract in her name. I recognize the course of the decisions of this Court, which hold that a sovereign is not liable for interest, except it be a matter of contract, or of statutory declaration, as instanced in the case of the United States *vs.* North Carolina; but that decision was largely rested upon the decisions of the Supreme Court of North Carolina, in which State the common law rule as to interest prevails, the rule at common law being that interest is allowed as damages for the failure to comply with a contract. This rule does not prevail in Virginia. In Virginia interest is allowed as an essential ingredient of the contract, and you can only be relieved of it by an express stipulation to that effect. In *Jones vs. Williams*, decided in 1799, and reported in 2nd Call., Edmund Pendleton, the President of the Virginia Court of Appeals, and one of the great judges of this country, said:

"Interest is allowed because it is natural justice, that he who has the use of another's money should pay interest for it."

In Virginia, therefore, interest is allowed, not as damages for the failure to comply with a contract, but on the ground of natural justice. Following that decision Judge Coalter, in *Hatcher vs. Lewis*, reported in 4th Randolph, said:

"The interest follows the principal as the shadow does the substance."

That rule of equity has been embodied for more than one hundred years in the jurisprudence of Virginia, and the same rule exists in West Virginia, not only because in her constitution she adopted the body of the laws of Virginia and made them a part of her jurisprudence, but because her decisions follow the decisions of Virginia and rest the right to interest on the ground of natural justice. The authorities are fully cited in the brief of the attorney-general of Virginia. The rule established in Virginia, not by statute but by the decisions of her court, is the law which governs a Virginia contract, and becomes a part of the contract as much so as if it had been written into it, and it would follow that when West Virginia's just proportion of the public debt of Virginia has been ascertained, as of January 1st, 1861, interest inheres in it by virtue of the law governing the contract. There is no decision that holds that a State is not as much bound as her citizens by a rule which is founded in Natural justice. But we are not left to rest our right to interest on the equitable rule which prevails in the State of Virginia. The ordinance provides:

"The new State shall take upon itself a just proportion of the public debt of Virginia prior to the 1st. day of January, 1861."

Does not that impose an obligation to assume the debt with its burden? The public debt referred to was an interest-bearing debt. It was a debt which West Virginia had helped to create, and her citizens were as fully cognizant of its terms as anybody else in the State of Virginia. Will she now be permitted to say that she did not intend to assume liability for any part of the interest arising under the obligations which represented that debt? If so, she would not assume a just proportion of it. The interest is an inherent part of the debt; it arises under the same contract; it is an essential part of the debt; it cannot be separated from it. Who would pay the interest on the part assumed by West Virginia if she did not pay it?

Her proposition is that she is only obligated to take upon herself a part of the principal of the debt, discharged of any responsibility to pay the interest called for by the obligations which represent the debt. Then she would not do what she solemnly contracted to do. She contends that her liability arises under a contract; if so, I can say in the language of Chief Justice Marshall: "It is a contract clothed in forms of unusual solemnity." Not only does her liability for interest arise under the so-called organic law known as the Wheeling ordinance, but it also arises under her constitution framed in November, 1861, which contains the following provision:

"An equitable portion of the public debt of the Commonwealth of Virginia, prior to the 1st. day of January, 1861, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and reduce the principal within thirty-four years."

In this provision she not only assumes an equitable proportion of the debt, but stipulates that she would pay the accruing interest on such proportion, and the principal within thirty-four years. If she is bound for interest, as I respectfully submit must be true, how long shall she be responsible for it—during the life of the bonds, or until payment? Her constitution imposed upon her the duty to speedily provide for the ascertainment and payment of her share of the debt. She had it within her power to abridge the period within which she would be liable for interest.

Mr. Justice Holmes: I do not think that the constitution of West Virginia was addressed to Virginia; it was addressed to its own citizens, was it not?

Mr. Harrison: Yes Sir, but the constitution—

Mr. Justice Holmes: Of course it was approved by Congress and all that?

Mr. Harrison: Yes, but Virginia consented to the formation of the new State on the terms stated in the constitution. According to the argument of our friends on the other side the constitution and the Wheeling ordinance, that ante-dated it by three months, together with the Act of Virginia giving her consent to the formation of the new State, and the Act of Congress admitting the State, constitute a contract. Part of that contract was the obligation to pay interest. If it be a contract it must be binding in all of its parts, as is contended for by the gentleman on the other side, except that in discussing in their brief the question of interest, they seek to escape

liability for it on the theory that interest was "outside of the contract." In other words, the compact on which they rely is valid for some purposes, but not effective as to other purposes. It would be only fair and just to require West Virginia to pay interest from the 1st. day of January, 1861, upon the amount found to constitute her portion of the debt, until the same has been paid. She cannot be permitted to solemnly assume an obligation and then repudiate it, or repudiate the larger part of it by neglecting and refusing to perform the duty imposed upon her, namely, to ascertain it and provide for its payment. It would be vastly to West Virginia's interest to postpone the ascertainment of her proportion of the debt, and postpone the payment of it indefinitely, if thereby she is to be relieved of the obligation to pay interest. Her constitution imposed upon her the duty to ascertain her part of the debt as speedily as possible, and to discharge it, principal and interest, within thirty-four years. She has chosen to neglect, and refused to do so. As I said a while ago, if she wanted to abridge the period within which interest was to run, she had it in her power to do so, but she chose not to do it. Now she asks this Court that she may be relieved from responsibility for any part of the interest, and thereby relieved, perhaps, of the larger part of the balance that would be found against her if this account is stated under the Wheeling ordinance.

This ordinance, if the plan of settlement prescribed by it is adopted, should be liberally construed in favor of Virginia, and strictly against West Virginia. Virginia had no part in framing it; it was framed by West Virginia for West Virginia, and if Virginia is to be bound by the plan of settlement prescribed by it, it is no hardship upon West Virginia to hold her to a rigid accountability under it, in order that the result reached may square with her obligation to pay a just proportion of Virginia's debt.

West Virginia would never have been admitted into the Union but for her obligation to pay a just proportion of this debt. When the bill for the admission of that State was pending in the Senate of the United States, there was strong opposition to it. Senator Powell of Kentucky said that if the Cities of New York and Brooklyn, and the Counties in which they are located, were to get up a bogus legislature and call themselves the state of New York, and ask to be admitted and cut off from the rest of the State, he would just as soon vote for their admission as to vote to admit West Virginia. Mr. Crittendon of Kentucky asked if they could lose sight of the fact that the parties applying for admission were the same parties that con-

sented to the admission. The bill passed through Congress on the ground stated by Mr. Stevens of Pennsylvania. He said he would not stultify himself by supposing that they had any warrant in the constitution for the proceeding, but that he could vote for the bill without any compunctions of conscience as a war measure and in aid of the administration's policy in respect to the border States. But even in spite of the pressure of the times, the bill would not have passed without West Virginia's assumption in her constitution of a just proportion of Virginia's debt. It only received a majority of six votes in the Senate, and voting in the negative were Senators Sumner and Wilson of Massachusetts, and Chandler and Howard of Michigan; while in the House nearly the entire Massachusetts delegation, and Mr. Conkling of New York and Mr. Conway of Kansas were recorded in the negative. I state on the authority of Senator Willey, then representing the so-called State of Virginia in the Senate of the United States, and of Senator Sherman, that the bill admitting West Virginia would never have passed but for her constitutional assumption of a just proportion of the debt of Virginia. I ask leave to read an extract from a letter written by Senator Willey to Senator Sherman some years after, and used by the latter in debate on the floor of the Senate when that subject was under discussion. The extract is as follows:

"I have a pretty distinct recollection that while the application for admission was pending before the United States Senate, you suggested to me this very matter, and that when I pointed out to you the clause in the constitution which I have above quoted, you expressed your satisfaction and stated to me that it removed one of the difficulties which had been embarrassing you; and I say to you now, what I have said to the people of West Virginia, that but for that clause in her constitution, the State would never have been admitted. I say further that in my opinion no honest man, or honest party, in West Virginia or out of it, will deny the obligation of West Virginia to pay an equitable part of the public debt of Virginia."

After quoting this extract, and after reading the eighth clause of West Virginia's constitution, Senator Sherman said:

"But for this stipulation in the constitution of West Virginia, which was submitted to the Senate at the time of the passage of the bill to admit that State, it never would have been a State of this Union." Congressional Record, Vol. 12, 47th Congress, p. 450.

I am justified, therefore, in stating as an historical fact that the

bill admitting West Virginia into the Union would never have passed through Congress but for her constitutional obligation to assume a proportion of the public debt of Virginia, and if Virginia is to be held to an accounting under the terms of the Wheeling ordinance, it is at least fair and reasonable that the mind shall incline to liberality in construing its provisions, so that the result may best accord with justice and common right. I ask, therefore, that if the Court feels constrained to require this account to be stated under and in pursuance of the terms of the Wheeling ordinance, that the balance found against West Virginia as of the 1st. of January, 1861, a date which she arbitrarily fixed, may bear interest from that period until settlement is made.

Another question involved is whether West Virginia is liable to account for the property which was transferred to her by the Act of the Restored Government of Virginia of February 3rd, 1863. That Act provided that "all property, real, personal and mixed, owned by, or appertaining to this State, and being within the boundaries of the proposed State of West Virginia when the same becomes one of the United States, shall thereupon pass to and become the property of the State of West Virginia, and without any other assignment, conveyance, transfer or delivery than is herein contained; and shall include among other things not herein specified, all lands, buildings, roads and other internal improvements, or parts thereof, situated within the said boundaries, and now vested in this State, etc., and shall include the interest of this State in any parent bank, or branch doing business within the said boundaries," etc., enumerating at great length a great body of property. In the Fifth Section of that Act it was provided that "if the appropriations and transfers of property, stocks and credits, provided for by this Act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State."

There was no settlement to be had with Virginia except the settlement of this debt question. It is contended, however, that this Act ought not to put any liability on West Virginia because it was passed after Virginia had given her consent to the formation of the new State, but this Act was an essential part of the transactions which resulted in the creation of the new State, and its terms were expressly assented to and accepted by West Virginia in an Act passed by her Legislature in 1875, which expressly recognized the foregoing Act by its title and date, and required the Auditor to ascertain and state the property which had been acquired under and in pursuance of that

Act. This Act is quoted and referred to in the brief of the Attorney-General of Virginia.

In the brief of counsel for West Virginia one reason assigned for exempting her from liability to account for the property which passed under the Act of February 3rd, 1863, is that those grants were made "mainly to afford a ground for the claim that the property which had passed by the separation, should be accounted for in the settlement hereafter to be made." Surely it can hardly be said that the members who composed that Legislature, who were prospective West Virginians legislating in the name of Virginia for their own benefit, would be interested in passing an Act which would create a claim against themselves. Why impute to that body a **sinister purpose in passing that Act?** Might they not be given credit for a good motive? Does West Virginia deny them credit for a good motive lest it might subject her to some liability under that Act? West Virginia seems to feel no pride of ancestry when it conflicts with her pecuniary interest. Escape from pecuniary liability is dearly purchased at the price of violated faith. The Answer of West Virginia expressly admits liability under the Act of February 3rd, 1863, notwithstanding the ingenuous arguments of counsel to escape from it. On page 8 of the Answer it is said:

"Respondent denies that she is chargeable for, or on account of the transfer of said property, except the stocks of companies, or corporations, and the credits," etc.;

and then the Answer takes the ground that this property, credits, etc., are of little value and would not count for much in the final result. I submit that in an accounting under the Wheeling ordinance the value of this property should be ascertained and carried into the account as part of West Virginia's just proportion of the public debt of Virginia.

The dismemberment of Virginia cannot be justified on the ground that she was more deserving of punishment than her sister States of the Confederacy. There was no ground for distressing her by penal enactments that would not apply equally to her sister States who were associated with her. Indeed her people were devoted to the Union, and her voice was for peace to the last; and yet she has been singled out of all the rest to have administered to her, in addition to what the others received, a punishment that struck down at once her prosperity and her pride of empire. She has been robbed of the power to pay her debt to innocent third parties scattered all over the North and abroad, who purchased her obligations when her credit

stood higher than any other state in this Union with the possible exception of her sister Commonwealth of Massachusetts. They were involved in the common ruin which was brought upon Virginia. She has been despoiled of one-third of her territory, by far the richest part of it, teeming with material resources that surpassed the wealth of the Incas—and all of this without her consent. West Virginia has profited by this. Is it any hardship upon West Virginia to require her now to do what she promised to do? She solemnly took upon herself the obligation when she inaugurated the proceedings that resulted in the dismemberment of Virginia and the distress brought upon her and her innocent creditors, that she would do a just part by them. Now she should be required to do it. And yet, gentlemen appeal to this Court to aid West Virginia by adopting a plan for the ascertainment of her liability, which, instead of putting upon her the burden which she assumed, would relieve her of it. I ask that the plan which shall be prescribed by this Court for the ascertainment of the proportion of Virginia's debt to be borne by West Virginia, may be a plan that will reach the result which she promised should be attained, namely, the assignment to her of a just and equitable proportion of that debt.



Supreme Court of the United States.

OCTOBER TERM, 1907.

Argument of Hon. John C. Spooner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA, *Complainant*.

v.

WEST VIRGINIA, *Defendant*.

IN EQUITY.

Original No. 4.

ARGUMENT OF HON. JOHN C. SPOONER, FOR THE DEFENDANT.

Mr. Spooner: May it please your Honors, the argument on behalf of the Commonwealth of Virginia has taken a very wide range. Many things have been stated by counsel as to purposes or attitudes of men nearly fifty years ago, which I have no means of knowing. I am somewhat surprised by the line of argument which has been pursued here. I have no harsh words to say of Virginia, nor do I think there is any justification in history for harsh words of West Virginia or the people who participated in her erection as a State, The act of the Wheeling convention and the acts which succeeded that convention, and the contract proposed by that convention and afterwards accepted by the State of West Virginia, are to be considered with reference, of course, to the situation at the time the transaction occurred.

At the Wheeling convention there were only two counties of Virginia represented, as contradistinguished from what afterwards be-

came West Virginia; there were two. The others were under a jurisdiction, not of the United States, but hostile to the United States, the officers of Virginia, and this Court has long ago drawn a well defined distinction between the state and the government of a state, so that it is not accurate to speak of the restored State of Virginia, as is sometimes done here. State is indestructible. There was no government of Virginia under the Constitution of the United States when the Wheeling Convention assembled. The ordinance of secession had been adopted in convention; it had not yet been voted upon by the people of Virginia, as I recollect it, at the date of the Wheeling Convention. The Capitol of the Confederacy has been moved from Alabama, Montgomery, as I recollect it, to Richmond, and there was no government of Virginia as a State in the Union. It is historically true, and will not be disputed, that the people of West Virginia were loyal to the Constitution of the United State and to the Union. They were not, as I have understood it, to any great extent slave owners or in favor of that institution. Of course, it was said on the argument of the demurrer that the Wheeling Convention was a revolutionary convention. True, but there was a State and the government of that State had abdicated, and were the people powerless to reofficer and rehabilitate that State? *Arma inter leges silent*, and the time comes when acts in such circumstances retain in them a validity which is as concrete as is attributable to any. The people of that part of Virginia had a right, in the situation, to organize en masse to the end that the government of Virginia under the Constitution might be reorganized and rehabilitated. That is not all, I suppose, which influenced those men, and I dwell upon it for a moment only. It is to be supposed that at that time grave doubt existed, which legitimately might, in the minds of the West Virginia people—I call them West Virginia people, but there was no West Virginia,—but in the minds of the Virginians who dwelt in what now is West Virginia, for fear the effort to take the state of Virginia and other states out of the Union might prove successful, and they were quite to be pardoned for not being willing if that misfortune should have occurred, that they should be taken under another government.

Now, Mr. Justice Harlan suggested, on the argument of the demurrer, in answer to the suggestion and the statement that it was a revolutionary convention, that there was a great deal of revolution in the air at that time, and that is true. This argument arose upon the decree tendered by the Commonwealth of Virginia which, I am

frank to say—I was not connected with the case at that time—seemed to me, from what I have known of it, to be based upon the entire misconception of the fundamental principle which should govern the case, and upon the bill, when I came to look it over, I had not supposed the validity of the Wheeling Ordinance was attacked. This bill, if the court please, asserted it, is based upon it largely, as to the property embraced by the acts of February 3 and 4, 1863. It was rested upon legislative recognition that implied obligation by the utilization of the property covered by it. But the bill set out two main grounds upon which the liability of West Virginia to account was rested. The first one was this, first the area of the territory now known as the state of West Virginia formed about one-third of the territory of the commonwealth of Virginia when this public debt was created, and its population included about one-third of the original state at the time of its dismemberment, and the state of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume therewith liability for a just and equitable proportion of the public debt created prior to the partition of such territory. That is the international law basis, as our friends understand it, and as it may be.

“Second. The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia, as it existed prior to the creation and erection of the State of West Virginia, forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861.”

Mr. Justice Holmes: What is that you are reading?

Mr. Spooner: From the bill, the second ground upon which the liability of West Virginia is rested in this bill. This volume here contains the bill and exhibits, the demurrer and the report of the arguments on the demurrer, and the briefs, and the opinion delivered by Mr. Chief Justice Fuller,

“in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is imbedded in the Constitution under which she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union.”

The ordinance is quoted also in the bill in full, and declared upon as a basis of liability as emphatically as ever any compact or contract was declared upon in a bill in equity or an action at law. There is

not a word in the bill, from beginning to end, impeaching the validity or the binding force and effect of the Wheeling ordinance.

The two grounds of relief which I have read to Your Honors are incompatible. It would seem to be thought not, but they are absolutely antagonistic, the liability on the basis of international law and the liability on the basis of the ordinance. On the argument on the demurrer attention was called to the rule of international law, and this occurred. I am reading from page 9 of my brief:

"One of the learned counsel for the complainant read, on the argument, from the opinion of Mr. Justice Field, who wrote for the court in *Hartman vs. Greenhow* (102 U. S., 672) this sentence:

'Where a state is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them.'

counsel added, 'That is in *Hartman vs. Greenhow*.'

Justice Harlan: 'Please read that again.'

Mr. Conrad: 'Where a state is divided into two or more states in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them.'

Counsel added: 'That is an opinion of this court that has received no dissent.'"

After a word of tribute to Mr. Justice Field, to which no one in this country would dissent, he said:

"But aside from this the quotation read from Mr. Justice Field did not in the slightest degree correctly put before the Court the view which he must be deemed to have entertained. We supply the deficiency, quoting all that he said:

'Writers on public law speak of the principle as well established that, where a State is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them. On this subject Kent says: "If a State should be divided in respect of territory, its rights, and obligations are not impaired; and, if they have not been apportioned by special agreement, their rights are to be enjoyed and their obligations fulfilled by all the parties in common." (1 Com., 26); and Halleck, speaking of a State divided into two or more distinct and independent sovereignties, says: "In that case, the obligations which have accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of courts, and the practice of nations." (International Law, c. 3, Sect. 27).'

Mr. Justice Field continues:

"In conformity with the doctrine thus stated by *Halleck*, both States—Virginia and West Virginia— have recognized in their constitution their respective liability for an equitable proportion of the old debt of the state, and have provided that measures should be taken for its settlement."

In *Antoni vs. Greenhow* (107 U. S., 769), Mr. Justice Field said:

"It is a well-settled doctrine of public law that, upon the division of a state into two or more states, the debt shall be ratably apportioned among them (*See authorities upon this subject in Hartman v. Greenhow* (102 U. S., 672, 677)."

Phillimore, after quoting both Grotius and Kent, says:

"If a nation be dividied into various distinct societies, the obligations which had accrued to the whole before the division are, *unless they have been the subject of a special agreement*, ratably binding upon the different parts;"

and Sir Sherston Baker in "First Steps of International Law," page 36, says the same thing.

When this decree proposed by the commonwealth of Virginia was presented, it was entirely silent upon the ordinance. As to the first provision we do not care as to the amount of public debt of Virginia as it existed on the first day of January, 1861. Second "what amount or proportion of said indebtedness and of the interest accruing thereon should, in equity, be apportioned to and be paid by the State of West Virginia," a provision entirely ignoring the ordinance upon which the bill, without challenging its validity, had based the right of recovery, incompatible with the international law basis, if the ordinance constitutes a binding agreement or compact between Virginia and West Virginia.

On the other hand, the decree proposed by the Commonwealth of West Virginia provided for an accounting on the lines of the ordinance. Now, your Honors, there was nothing said in that brief that was intended to suggest, as my friend, the Attorney General—if I may refer to him as the Attorney General—has said, that this Court was controlled by any rules in the exercise of its original jurisdiction. It is, of course, indisputable that the Court makes such rules for the conduct of a cause as it deems wise and in the interest of justice and orderly procedure, but we thought that two lines of investigation proceeding, not only upon absolutely different, but absolutely antagonistic principles, one under the Ordinance involving an investigation of the items indicated in it for forty years, and another, at the same time, proceeding upon a basis which was not defined at

all, but proposing to cast the whole case at large into the hands of a master with no indication by the court as to the principle which should govern the investigation, which would be a burden of labor, take indefinite time, cost a great deal of money, and that neither investigation would help the court in determining which of the two should be adopted, therefore we felt that the court, before referring this cause to a master to state an account, should determine, if it might do so upon the record, if there is no evidence to enable the court to determine whether the Ordinance is binding upon the two States. There is no dispute as to the manner in which this compact came about, and if it is binding, that obviously is the principle which should govern, so far as that is concerned, the accounting.

This case has been full of astonishments. There is handed to us today a proposed decree on behalf of the Commonwealth of Virginia, to a portion of which only we would care to protest. The decree states:

"What is the just amount and proportion of said debt, including the interest thereon, which should now be apportioned to, and paid by, the State of West Virginia? Such amount and proportion of said debt the master will ascertain by charging against West Virginia:

"(1) All expenditures made by the State of Virginia within the territory which now constitutes the State of West Virginia since any part of said debt was contracted.

"(2) Such proportion of the ordinary expenses of the government of Virginia since any part of said debt was contracted as was fairly assignable to the counties which were erected into the State of West Virginia."

That is not in the language of the Ordinance, but I do think that the difference might not be very substantial, except that the one would be illuminating to a master, but the other has words which might confuse him. So that this proposition here tendered is for an accounting on the basis of the Ordinance.

Mr. Justice White: What is that paper you are reading from?

Mr. Spooner: I am reading from the amendment to the decree proposed by the Commonwealth of Virginia.

Mr. Justice McKenna: Is the only objection you have to it the use of words which you say would be confusing?

Mr. Spooner: No sir, that is not the only objection we have to it.

Mr. Justice White: Is that all of it you are reading?

Mr. Spooner: No, I have read the two items that relate to the Ordinance. It continues:

"In ascertaining this, the master will take as the basis or criterion upon which the apportionment of said expenses shall be made the average total population of Virginia, excluding slaves, as nearly as the same can be determined from the United States Census for each of the decades in which such expenses were incurred and paid."

I do not know that we should object to that. If population is to be made the basis of accounting, extending through forty years, it ought to be averaged, in justice. This is substantially as we proposed, with the amendment as to slaves, and it should be averaged on the basis of several ten year federal censuses, including slaves as part of the population.

"From the aggregate of the amounts thus ascertained, the master will deduct all moneys paid into the treasury of said Commonwealth from the counties included within the State of West Virginia during said period."

There is the last clause of the Ordinance again, so that we may be excused if, remembering the allegations of the bill, remembering the very explicit and strong statement by the Attorney General of Virginia, who was not only counsel for Virginia but the law officer of the State, in the argument of the demurrer, in which he asserted a position as to the Ordinance which I do not think differs from his position now except in one respect. Your Honors will find, on page 324 of the record, in the argument of Mr. Anderson, the following:

"MR. ANDERSON: In the 11th Wallace case it was established that the Wheeling government was the government of Virginia, and the effect of that decision was to uphold the validity of what is known as the Wheeling ordinance.

"Now instead of letting these questions be settled upon the principle of equity and public law, that convention prescribed this artificial and arbitrary basis of adjustment. We have to concede that we cannot go behind this, that we must accept it.

"Section 9 of the ordinance, giving the consent of Virginia to the formation of the new State, reads as follows:

"MR. JUSTICE HARLAN: What are you reading?

"MR. ANDERSON: From the Wheeling Ordinance quoted at page 3 of the brief of the counsel for the plaintiff. Section 9 of the ordinance reads as follows:

"9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the 1st day of January, 1861. to be ascertained by charging to it all of the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Com-

monwealth from the counties included within the said new State during said period.’”

“That is the basis upon which the consent of the Commonwealth of Virginia was given to the formation of this new State. The stipulation imposed by Virginia upon West Virginia as a condition upon which her consent was given, and which afterwards, in forming the State of West Virginia, the people of that new Commonwealth accepted and assented to, was that the new State should assume and take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained in the manner therein prescribed. That was a fundamental as well as a contractual provision, and it constitutes a primary obligation and lies at the very foundation of the right of West Virginia to be a State.

We may be pardoned, I think, a little surprise that the validity of the Ordinance should be so vehemently attacked here as has been done today.

Mr. Justice Harlan: When you refer to the consent of the Legislature of Virginia, do you allude to the act of May, 1862?

Mr. Spooner: There was a later act, after the adoption of the amendment which was required by the Congress, an amendment to the constitution.

Mr. Carlile: December 6, 1862.

Mr. Spooner: But this, to which the Attorney referred in the brief—we had not then discovered this other act—was the act of the Legislature of Virginia of May 13, 1862, upon which Congress acted in admitting West Virginia into the Union.

Mr. Justice White: What was that act? What page is it?

Mr. Justice Harlan: Page 438.

Mr. Spooner: I have it here:

“That the consent of the legislature of Virginia be and the same is hereby given to the formation and erection of the State of West Virginia within the jurisdiction of this State, to include the counties of Hancock, Brooke and Ohio (and many other counties), according to the boundaries and under the provisions set forth in the constitution of the said State of West Virginia and the schedule thereto annexed proposed by the convention which assembled at Wheeling on the 26th day of November, 1861.’”

Mr. Justice Harlan: That does not refer, I believe, to the Ordinance, does it?

Mr. Spooner: No sir.

“ ‘Be it further enacted That this act shall be transmitted by the executive to the senators and representatives of this Commonwealth in Congress, together with the certified original of the said Constitution and schedules, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of West Virginia into the Union.’ ”

It is true, and stated in this connection, that the convention which framed the constitution—we have the proceedings here, they are very dignified—repudiated the Ordinance of the session. They declared the necessity and the right that their State should have a government, and they announced their purposes in the movement and set forth at length the Wheeling Ordinance and appointed a committee to communicate to the Congress to urge the Congress to admit the State into the Union.

Mr. Justice Harlan: This was the convention of November, 1861?

Mr. Spooner: Yes sir, the convention which framed the constitution.

Mr. Justice Harlan: That is the constitution that contained those words “equitable proportion of the public debt?”

Mr. Spooner: Yes, your Honor, and the record of Congress shows that the Ordinance and the constitution, of course, and the proceedings of the convention which rehabilitated Virginia were sent to the Congress, were presented in the Senate and referred to the Committee on Territories of which Mr. Wade was the chairman.

Mr. Justice White: And yet, it being before Congress, as far as the obligation to pay a just proportion of the debt was concerned, the method was not reported by Congress.

Mr. Spooner: I do not know that it was. I do not remember any discussion on the subject except that Mr. Crittenden of Kentucky, as I recollect it, inquired whether provision had been made for the assumption of any part of the debt, and was informed that it had not, that it was in the constitution, and my associate called my attention to this document, which we deemed it would be proper to bring to the attention of the court, Miscellaneous Document No. 99, Senate, which embraces all the proceedings of the Wheeling meeting.

Mr. Justice Moody: The Wheeling Ordinance was not treated by Congress as the consent required by the constitution in the formation of a State.

Mr. Spooner: No, the Wheeling Ordinance was an enabling act, so far as it could be made an enabling act; it was a proposition, which this Court held in the case of *Virginia vs. West Virginia*, made by the convention to the people of West Virginia. It provided for the calling of a constitutional convention; it provided for the erection of the State out of the boundaries of the State of Virginia, designating the counties. It contained this provision, that the new State "shall take upon itself a just proportion of the public debt of the Commonwealth prior to January 1, 1861," to be ascertained in the way provided. Delegates were elected and the convention was held, and the constitution was adopted and submitted to a vote of the people, and adopted by the people. The legislature of the rehabilitated State of Virginia enacted, then, a law consenting to the erection of the new State and its admission into the Union under her constitution.

Mr. Justice White: Under the Constitution.

Mr. Spooner: Under the Constitution.

Mr. Justice White: Of course, I do not know what you are proposing to discuss now; you have directed attention to a very serious matter, the averments of these bills admitting the Wheeling Ordinance as the criterion and rule by which this can be determined. You quoted those averments in the bill, and the counsel this morning took a contrary stand; I do not know whether the State did or not, because the gentleman who opened this case was speaking as an *amicus curiae*. You have stated, too, as I understand from your argument, that the bill proceeded upon a contributory theory. It propounded the international rule as the method, and then it asserted the Wheeling Ordinance as the method. Irrespective of this question of the admission of the State and the statements made in argument, and so on, are you proposing to discuss the original question?

Mr. Spooner: I am proposing to discuss the question as to whether the Ordinance is the original agreement.

Mr. Justice White: I am listening to you as intently as I know how, and I have a thought that has been running in my mind that I would like to suggest to you. You speak of the agreement between the States, or contract. The Constitution forbids a contract between States or a compact between States, except with the consent of Congress. In view of that provision of the Constitution, can there be any agreement between States which has not been sanctioned, and if that be true, are we not to deduce the sanction

of Congress from the constitution as submitted to Congress and as recognized by that body? If that be true, and there were conflict between the Ordinance and the provisions of the constitution, must not the provision of the constitution dominate, and must not the consent of the two States be confined, and confined alone, to that agreement which finds its sanction and proof in the constitution of the State submitted to Congress? I do not know whether I make my thought clear.

Mr. Spooner: Answering the questions separately, it is undoubtedly true.

Mr. Holmes: I would like to refer you, as bearing on that, to one case you have not mentioned in your brief, the case of *Wedding vs. Meyler*, 192 U. S., 582, where the so-called Virginia compact was dealt with, under which the new States on the other side of the Ohio were called into existence. There, the preliminary act of Virginia, the statute of the United States assenting to that preliminary act of Virginia and the subsequent adoption of the constitution of the new States were held *ipso facto*, to make the new States.

Mr. Spooner: It seems to me, of course, to be true, that a contract cannot be properly made between two States without the consent of Congress, nor can a State be erected lawfully out of the territory of another State without the consent of the State and Congress. This assent and compact, of course, until the Congress admitted West Virginia into the Union as a State, that question was raised in this case of Virginia against West Virginia, reported in the 11th Wallace, and in the other case, but Virginia was held by this Court to be under that government a State competent to consent to the erection out of her territory of a new State and its admission into the Union. It was a proposition and an acceptance that amounted to nothing efficient until the Congress had consented to it. It then became a valid compact.

Mr. Justice White: It cannot be that the consent of Congress was expressed with a condition.

Mr. Spooner: I will get to that question. The condition was one which could not relate in anywise to the compact. It did not depart from the Ordinance in any respect.

Mr. Justice White: One moment. If I, for instance, were sitting on a court, and it was proposed to carve out a new State, and I said to myself, "Under my office and with the sense of the obligations which result from a public debt, no agreement between

these States to carve out another will ever be recognized or voted for by me which does not adequately provide for a just distribution of the public debt," and a provision is inserted in the act which ratifies, providing for that just distribution, but the compact itself provided for no distribution, would the compact stand and be, as a compact, directly repugnant to the act?

Mr. Spooner: Certainly not. Congress could not make the compact, but this is academic so far as the change in the Virginia constitution was concerned, because afterwards the Virginia legislature repeated its consent.

Mr. Justice Harlan: How, in what way?

Mr. Spooner: It passed another act.

Mr. Justice White: Referring to the Wheeling Ordinance?

Mr. Spooner: Neither referred to the Wheeling Ordinance.

Now, if your Honors please, I will take up this question as to which, it seems to me, the argument on the other side is unintentionally misleading, and I go now to discuss very briefly the question whether the 8th article of the constitution of West Virginia did not import into it article 9 of the Ordinance. It is too late to discuss the proposition that the Ordinance was the act of Virginia; that has been settled, I take it. That Ordinance provided:

"That the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained"—

Why is that omitted? Upon what theory does the learned counsel read a part of the sentence—it is all one sentence—and omit the remainder of it? If it read: "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," that would present an entirely different case to the court, but it does not read that way. It reads this way:

"The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained."

Mr. Justice Harlan: Just there, Senator, do you think the effect of those words in the Ordinance is to make a provision inconsistent with the constitution in that regard?

Mr. Spooner: Not all, I think they are to be read together.

I think where the proposition had been made and accepted, and the language of the court in 11th Wallace is instructive on that subject, that they are to be read together, and that where a proposition had been made by the State of Virginia to erect herself into a new State, erect a new State out of the territory of Virginia upon condition that she should take upon herself a just proportion of the public debt of the Commonwealth of Virginia prior to the first of January, 1861, to be ascertained in a specific manner, and the convention provided for by that Ordinance meets, having complied as to the election, and all that, with the requirements of the Ordinance, and in an article, article 8, provides that the State shall assume an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, I think that was the end of the assumption by the constitution of liability.

Mr. Justice Harlan: You would have the constitution read, then, as if those words "to be ascertained," etc., had been inserted in the constitution?

Mr. Spooner: Exactly, your Honor. If I made a tentative agreement with my learned friend and assumed an equitable proportion of a certain indebtedness in the settlement of some matter between us to be ascertained in a particular way, and should evidence my agreement by a bond to be executed later, and I executed a bond assuming an equitable proportion of that indebtedness and agreeing to discharge it, I think the two would, of necessity, be read together. I think the definition of what was agreed between us should constitute an equitable proportion.

Mr. Justice White: Suppose there was a third party having absolute power over your ability to contract and the power of your minds to meet depended upon his assent, and he was concerned merely with seeing that an equitable proportion was assumed, and when he came to ratify that contract, he said, "You shall assume an equitable proportion," but did not give any reason or any expression of opinion as to the method by which it could be shown; in other words, he put the general obligation without any expression of the method, and it all depended upon his consent.

Mr. Spooner: That goes back to the question whether this Ordinance should be held to be an invalid one, that is, entirely ineffective—

Mr. Justice White: Until Congress assented to it, yes.

Mr. Spooner: (Continuing) in its relation to the constitution.

Mr. Justice White: Until Congress assented to it.

Mr. Spooner: Until Congress assented to it. That would seem to depend upon whether the Ordinance is to be read as incorporated in section 8 of the constitution.

Mr. Justice White: I want to call your attention to another thing which occurred to me this morning. That act of Virginia to which you refer, that subsequent act, as ratifying in express terms, refers, not to the Ordinance, but says "as stated in the constitution."

Mr. Spooner: Virginia, your Honor, recognized this Ordinance by law after the war.

Mr. Justice White: I did not know anything about that, that is why I asked it.

Mr. Spooner: The foundation of her refunding act was recognition of this Ordinance.

Mr. Justice Harlan: Are the proceedings of that Wheeling convention in print?

Mr. Spooner: Yes sir, I think they are, they are in the Library.

Mr. Justice Harlan: Are you able to say whether there is anything in the proceedings directly referring to the Ordinance?

Mr. Spooner: I have not examined them. I tried to find the proceedings in the Library to which I have access, but I could not find them. It has been recognized by Virginia as having been imported into the constitution. Your Honors will find many places in the bill and in the exhibits to the bill, legislative recognition by Virginia that the Ordinance was imported into the constitution. It cannot be thought that the convention intended to assume in the constitution a larger liability than was embodied in the act of Virginia which led to the calling of a convention and led to the adoption of the constitution.

Mr. Justice Holmes: I do not suppose there is any doubt that if that Ordinance alone had been passed and thereupon the convention had been called, simply purporting to call the State of West Virginia into existence subject to the approval of Congress, and Congress had approved, and that was all, and nothing whatever had been said about that clause, that thereupon, by the coming into existence of West Virginia, there would have been a contract made between the new State and the old.

Mr. Spooner: I think that is very clear from the decision in *Green vs. Biddle*, and also in the case in 11th Wallace. In 1871, when the legislature of Virginia passed this first act, the refunding act (page 24 of my brief) under which it declared that it was liable for two-thirds of the debt on the basis of international law, and proceeded to issue a great many millions of dollars of certificates to be accounted for by West Virginia as her portion of the debt, including the Ordinance, in the preamble they say:

“Whereas, in the formation of the State”—

This is not the voice of counsel, this is the voice of Virginia after carpet-baggism had passed away and she came to her own--

“Whereas, in the formation of the State of West Virginia there were included within its boundaries about one-third of the territory and population of the State of Virginia; and

“Whereas, in the ordinance authorizing the organization of such state it was provided that the said State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this State, and will continue to be made as long as may be necessary; and

“Whereas, the people of this Commonwealth are anxious for the prompt liquidation of her portion of said debt,”

recognized by the legislature of Virginia as of efficiency, and the foundation of West Virginia's liability to account on the basis of the Ordinance. There are so many recognitions of it from first to last, and today counsel criticized West Virginia for some of her adverse legislation. There is much to be said in criticism, in a friendly, decent way, of the conduct of Virginia toward West Virginia preventing an adjustment upon the basis of the Ordinance. So that, if the Court please, it seems to me, in view of this detailed agreement or proposition from Virginia of what would, in her judgment, be accepted as a just proportion of her contribution, that it cannot be ignored, and that West Virginia can be said to have assumed at large, without any reference to the Ordinance whatever, an equitable or just proportion of the indebtedness. Counsel are very accurate when they say that this Ordinance does not deal in terms with the debt; that is true, it is no assumption of any part of the debt as such. West Virginia never agreed, if this Ordinance is to be read as part of the con-

stitutional provision, to assume any portion of the debt as such. All that can be said of the Ordinance, if it be binding, there is no reason to suppose that West Virginia would have accepted Statehood if it had been the understanding that she should be liable upon the basis of international law for one-third of thirty-three millions of dollars then due by Virginia to her creditors, evidenced by her bonds. My learned friend who spoke before me spoke about what a trap this would have been for West Virginia, supposing she had assumed in her constitution, what had been agreed between Virginia and her convention should constitute her equitable contribution to West Virginia on account of her debt, rub out the Ordinance, obliterate it, treat it as it never had existed and as if, independent of it, there was a mere absolute agreement or compact on the part of West Virginia to bear an absolutely indefinite portion of the debt.

This Ordinance is called by our friends one of the constating instruments which underlies the existence of the State. Is it not? It defined the boundaries of the State, it continued the laws of titles in the new State; it perfected the conditions which must be embodied in the constitution. Was it necessary to repeat, in section 8 of article 8 of the constitution, the Ordinance? Is there any theory compatible with the method employed by judicial tribunals in dealing with contracts to dislocate entirely from the constitutional provision the Ordinance or proffer? The court said, as to the boundary, in the case in 11th Wallace, that it was a proposition made by Virginia to the people of West Virginia, and was accepted by the convention and became subject to the approval of Congress, a contract or compact between the States.

The Chief Justice, in the opinion on the demurrer, reads the Ordinance and the constitutional provision together. True, it was in deciding against the contention that West Virginia had entered a compact with Virginia, under which she, West Virginia, was to be the sole arbiter in determining the amount under the Ordinance. The court is asked to ignore absolutely, in construing this constitutional provision assuming an equitable proportion of the debt, the Ordinance, which has not seemed to us possible. It was perfectly competent, and it was not unreasonable, either, at the time of it, that the condition defined in the Ordinance should have been imposed. Your Honors will remember that it is alleged in the bill and admitted by the answer that the thirty-three millions of dollars of bonds, or nearly all, were issued by Virginia for the purpose of constructing public works, and it is ad-

mitted in the bill that very much the greater portion of the money was expended in what is now Virginia. It is alleged in the answer that a third of it was expended in what is now West Virginia, or I should say, three million dollars of it. It would not be an unnatural or unreasonable thing, it having been a debt created for works of internal improvement, the greater part of which, very much greater part of which, upon a division of the two States would remain within the limits of Virginia, canals, railways, and other public works, that she would charge to West Virginia all the money expended within her limits for works of internal improvement, because they would remain within the limits of the new State. If that was their view, they could not be criticised as imposing a condition of assent which was, in itself, unjust, and the ordinary expenses of the government, a just proportion, for forty years, were, in addition, to be charged to West Virginia. If it had been adjusted seasonably, if your Honors please, it would not have seemed an unfair proposition. But in the lapse of years for which both, so far as delay is concerned, have been responsible, West Virginia's development has made her very rich, so far as taxable values are concerned, and as the answer alleges, great deposits of minerals have been developed in Virginia, and the Virginia today, in point of wealth, is not the Virginia of 1861, in spite of all the waste and loss incident to the war.

We do not agree upon the question of interest. I have thought that question did not now arise. If the accounting is to be under the Ordinance, it certainly does not now arise, and testimony need not be taken in regard to it, nor need the court, as it would not without further argument, pass upon it. It is not necessary, in order to a full ascertainment of the liability under the Ordinance. No interest was to be paid under the provisions of the Ordinance. No interest was to be paid on the moneys expended by Virginia in what are now the limits of West Virginia. No interest was to be charged on the ordinary expenses; no interest was to be credited to West Virginia on the third item with which she was to be credited, all moneys paid into the treasury of the Commonwealth from the counties now a part of West Virginia from 1820 to 1861, so that if the Ordinance is to govern, the constitution read in the light of the Ordinance as we contend it should, this accounting can go on, and the question of interest will arise later, because if interest is to be paid, it is agreed among us all it is to be paid on the amount found due under the Ordinance if the Ordinance is to govern. The Attorney General says in his brief

which is, of course, an able presentation of his view, served on us yesterday, at page 6:

“While the basis of settlement prescribed by the Wheeling Ordinance is, as we have always considered it, arbitrary and inequitable, we have never taken the position that that Ordinance, reasonably and fairly construed, and taken and applied together with the Act of the Restored Government of Virginia of February 3, 1863, and section 8 of Article VIII of the Constitution under which West Virginia became a State, was not binding on both States.”

Counted upon in the bill, admitted by the law officer of the Commonwealth in his argument, embodied in the decree which is proposed as an amendment as to govern the accounting, the dispute being only as to the question of interest, and restated in a strong way in the brief of the Attorney General, it would seem to us that the binding effect of the Ordinance was not open to question in this Court.

Now, if your Honors please, we should want some time to file a brief upon this question of interest, if it shall become necessary. It was briefly discussed in the argument which we filed in connection with the statement that we did not regard it is necessary at this time to decide it, which we still assert, but if it is to be decided, I deny utterly the contention of the learned counsel on the other side that that constitutional compact, that compact, in other words, created by article 8 of the constitution, can be construed as any agreement upon the part of West Virginia to pay interest. The vice of the argument on the other side seems to be in assuming that West Virginia, by her constitutional provision, if the Ordinance were omitted, took upon herself a part of the debt as such. I will not say, if the Ordinance were omitted, but what was to be ascertained under the 8th section of the constitution. It would probably be on an international law basis, as they understand it, population and territory; that would not require very much ascertainment, but all that they are required to do under this constitutional provision. I think it is argued in the brief, that the provision that the legislature of West Virginia should ascertain as soon as practicable the amount and should make provision for a sinking fund for the payment of accruing interest thereon, and the principal when due, excludes absolutely the notion that West Virginia was contracting to pay any back interest or accrued interest as contradistinguished from accruing interest. There is not only a philological difference, but there is

a legal difference between the two which has often been recognized by the courts.

Mr. Spooner: At the adjournment of the Court I was speaking of the liability of West Virginia to pay interest.

I had called the attention of the Court, I think, to paragraph 6 of the interlocutory decree now proposed by Virginia, after having remarked that as to the remainder of the proposed decree there was very little difference between the State of Virginia and the State of West Virginia as to the main contention. It is asked that the Court will instruct the master thus, after making the accounting under the Ordinance, and also taking an account of the value of the property granted to West Virginia by the act of the Virginia legislature of February 4, 1863:

"The balance thus ascertained, with interest thereon from the 1st day of January, 1861, until the same shall be paid, will be the amount and proportion of the debt of the Commonwealth of Virginia existing before that date, assignable to West Virginia and which that State should pay."

To that, upon any hypothesis, we object. As I said yesterday, the Ordinance, whether it be taken as a compact or as an agreement between the two States definitive of article 8 of the constitution, that is, as to what would constitute the equitable proportion which West Virginia should contribute to the State of Virginia, said nothing about interest, nor is there anything in the constitutional provision, section 8, which bears, we think, the construction contended for in the brief of the distinguished Attorney General. Article 8 of the West Virginia constitution provided:

"An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for part of the debt as such, bearing interest as it did, but was to assume the payment of a sum of money to be ascertained upon a basis defined in the Ordinance, to be paid by West Virginia to Virginia. She might pay it to her creditors or she might do otherwise if she chose. That payment by West Virginia was to be on account of the public debt; it was to relieve her of her share of any burden of the public debt."

Now, if I may call the Court's attention again to this language:

"An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be

assumed by this State; and the Legislature shall ascertain the same,"

that is, the equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861. That proportion was what was to be ascertained:

"and provide for the liquidation thereof,"

the proportion to be ascertained as between Virginia and West Virginia, which West Virginia shall pay to Virginia,

"by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

The theory of the learned Attorney General is this, that this amount being ascertained, the State of West Virginia is bound under this constitutional provision, or under the Ordinance, as he reads the Ordinance into the constitution, and Virginia treats it as a binding compact or definition of what was to constitute an equitable proportion, just as we do, the interest on the same thus ascertained is to accrue from the first day of January, 1861. Upon what theory? Upon the theory, so far as the brief indicates, that West Virginia had assumed an equitable proportion of the debt, and the debt was an interest bearing debt and therefore West Virginia assumed to pay an equitable proportion of the debt ascertained in this way, and interest from the date of the secession of Virginia. There are many authorities in the brief in support of the proposition that under the laws of Virginia, between private parties interest goes with the debt; it follows as the shadow follows the substance, but there are no authorities in the brief in support of the proposition that under the laws of Virginia the Commonwealth of Virginia pays interest, or that the Commonwealth of West Virginia pays interest, except where the sovereign has contracted to pay interest, either by agreement or by an enactment by law. I did not have time to run through all the authorities, but I have examined such as I could, and I found that as early as 1831 the supreme court of Virginia had stated in an opinion that in a particular case, which was a tobacco warehouse case, there was no liability for interest. There had been other cases, apparently, under that system, in which the State officer had been charged with interest, the party defendant representative of the State, and the State had paid interest, but it is expressly declared in the opinion that the general question whether the State is liable for interest, except by express agreement, is not decided, and I was unable to find, as far as I have examined, any authority for the proposition that

without agreement or statute either Commonwealth, either sovereign, was bound to pay interest.

But it is perfectly clear to me that the distinguished Attorney General misconstrues this constitutional provision upon which he relies as a compact or contract, the constitutional provision as constituting an agreement in execution of which the court would require interest on the portion ascertained from the first day of January, 1861. That would not be implied; it especially would not be implied where the language of the provision is such as to exclude it, and the language of this provision is such as to exclude it: "shall be assumed by this State, and the Legislature shall ascertain the same as soon as it may be practicable and provide for the liquidation thereof." It has never been liquidated, never has passed from the realm of liability through the status of debt: "ascertain it and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest."

At the adjournment yesterday I was remarking upon the difference, both in law and philologically, between the word "accrue" used in such a connection, and the word "accruing." I had this brief but half a day before the case was called, and found a decision in 159 Pennsylvania, *Gross v. Partenheimer*, where the question was precisely presented to the court. The statement of the case is very brief. In April, 1893, plaintiff agreed to purchase from defendant a lot for eight thousand dollars, payable five thousand dollars in cash on delivery of deed, and the residue by plaintiff's assumption of a mortgage for three thousand dollars then on the lot, plaintiff to pay also the accruing interest on said mortgage not exceeding six months. The six months' interest from date of mortgage to February 26, 1893, was past due and unpaid, and to avoid foreclosure proceedings, plaintiff was compelled to pay the same. He then brought suit to recover the amount thus paid, the vendor claiming that the vendee was obliged to pay it under the agreement. The court said:

"This contention hinges entirely on the proper construction of the clause in the contract of sale, above referred to, wherein the plaintiff agrees to pay 'the accruing interest on said mortgage not exceeding six months.' There is nothing in the affidavit of defence that can in anywise aid or control the construction of this clause. If 'accruing interest' means interest which, according to the terms of the security, was due and unpaid at the date of the contract, the defendant's construction should prevail; but, we cannot agree that these words mean any such thing. Such a construction would be strained and wholly unwarranted by the language em-

ployed. As generally understood, 'accruing' interest means running or accumulating interest as distinguished from accrued or matured interest. When we speak of interest which is from day to day accumulating on the principal debt, but which is not yet due and payable, we call it accruing interest. When we refer to interest heretofore payable, but still remaining unpaid, we speak of it as overdue interest, arrears of interest, or interest in arrear, just as we speak of rent in arrear. We are therefore of opinion that the words 'accruing interest' do not refer to, nor in any manner embrace any part of the six months' interest which was then overdue and unpaid. That interest was an incumbrance on the lot, which the defendant was bound to remove. He refused to do so; and the plaintiff, who was compelled to pay it in order to prevent foreclosure of the mortgage, etc., is entitled to recover the amount thus paid with interest from date of payment. The learned court was clearly right in adjudging the affidavit of defence insufficient and entering judgment against defendant for the amount claimed by plaintiff."

I will take no more time upon that, but I have this further to say on this question of interest, and it bears on the suggestion which I made to the Court yesterday, that it is not necessary now to determine the question whether the sum, when found due on an accounting under the direction of the Court, bears interest or not, or from what time it bears interest, because, even if the construction contended for by the distinguished Attorney General were correct, or be sustained by the Court, on the obvious face of this case, the interest could not be demanded from the first day of January, 1861. In 1866 the State of Virginia brought a suit against West Virginia in this Court; not to be reprobated for it; it had a perfect right to do it, but it brought a suit to have determined the counties of Virginia, what counties were in Virginia. That cause was depending in this court undecided until 1871, and it needs no argument to show that until the boundaries of West Virginia were determined, until it could be known what counties were in West Virginia, it would be absolutely impossible, under the Ordinance, and I am speaking on the assumption that the Ordinance will be read with the constitution, thereby making definite what otherwise would be indefinite, and what the parties evidently intended should thereby be made definite, so that by the act of Virginia an ascertainment was deferred and rendered impossible until 1871, and the court will find in the papers in the bill and exhibits, and otherwise, various occurrences and facts which delayed and rendered impossible for years by Virginia an ascertainment by concurrence of the two States in the amount under the Ordinance or otherwise.

Mr. Justice Holmes: I do not think I quite appreciate that argument. If you put it as if it is entirely clear about the ascertainment of the boundaries, on the same principle that you announced a little while ago that the State of Virginia, however much diminished, remains the single debtor on the public debt, why does not the State of West Virginia, however bounded, remain the single contractor on the contract that your are assuming existed?

Mr. Spooner: Oh, I am arguing on the basis of it coming under the Ordinance.

Mr. Justice Holmes: Yes.

Mr. Spooner: And under the Ordinance the first item is all expenditures made by Virginia.

Mr. Justice Holmes: I did not follow that; I see now.

Mr. Spooner: During the forty years within the limits of West Virginia as to the ordinary expenses, a third of the moneys paid into the treasury during that period from the counties of West Virginia.

Mr. Justice Holmes: Yes, I did not understand that at first.

Mr. Spooner: So much for that. I cannot take the time to discuss further the question as to the relation of the Ordinance and the constitutional provision. I have not been able to change my conviction that the two must be read together. If the Ordinance had contained no provision in regard to the assumption of any part of the debt, it is not to be supposed that the constitution would have contained any assumption of an equitable proportion of the debt. It was in the Ordinance as to the debt as it was in the constitution, the clause that follows this provision about the debt in the same section 9:

“All private rights and interests in lands within the proposed state, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in the State of Virginia.”

That was carried into the constitution. Our view is that it was no more carried into the constitution than the Ordinance was, as to the debt, by the general language of assumption, and I agree entirely with the suggestion of his Honor, Mr. Justice Holmes, and we had argued it in the brief, that the direction of the legislature to ascertain the debt and the provisions which follow as to establishment of a sinking fund are not a part of the assumption of the new State: That assumption was complete with the first sentence and it, we claim, was an assumption of a proportion which had been defined between the parties. The remainder of it was an injunction by the constitution of West Virginia upon the legislature of West Virginia. If the Or-

dirance has nothing to do with this constitutional provision, if it is to have no influence in the determination of the controversy here, then the equitable proportion of the debt assumed by West Virginia in the constitution was not pursuant to a proposition made by Virginia in the Ordinance to the people of the proposed new State, nor a condition nor assent to the erection of the proposed new State. It was a purely voluntary assumption by West Virginia. If a purely voluntary assumption by West Virginia, it can be recovered upon only, or reliance be put upon it only, as West Virginia assumed it, and if the Ordinance is left altogether out of consideration here, it is almost an irrefutable proposition that when the legislature of Virginia passed the act consenting to the admission of the State under this constitution, it was agreed that the proportion of that debt which West Virginia was to bear, I mean the sum which West Virginia was to pay on account of that debt to Virginia, was to be ascertained by the legislature of West Virginia. Call it a compact or not, that contention was made to the court on the argument to the demurrer, and the court overruled it. The court said it was not a compact, but the court defeated it by a resort to the Ordinance, and the court, in the opinion delivered by his Honor the Chief Justice, said that the Ordinance, being *in pari materia*, the Ordinance being read in connection with the constitutional provision, that where the constitution provides that the legislature shall ascertain, it means that the legislature shall ascertain as provided by the Ordinance.

Now, your Honors, one thing further. This controversy has lasted a great many years. The nearer Virginia and West Virginia can come together in this cause, looking to the elimination of the harassment and cause of bitterness which this unsettled affair has caused through many years, the better. I called the attention of the Court yesterday to the attitude of the pleadings on the subject of the Ordinance, and I quoted from the Attorney General's argument when the demurrer was pending before the Court. I called attention, in addition, to the fact, which ought not be forgotten, that the decrees about which we differed, so far as Virginia was concerned, have been practically withdrawn, and the decree now tendered by Virginia is, except as to the matter of interest, and perhaps one or two matters upon which counsel could doubtless agree, in accordance, substantially, with our contention and the contention of West Virginia. The learned Attorney General says, in his new brief, on page 6:

"We are constrained to recognize the following propositions as true:

"(a) That the State of West Virginia could have no legal

birth or existence without the consent of the Legislature of Virginia.

"(b) That the only Legislature of Virginia which ever gave its consent to the formation of West Virginia, was the Legislature of the Restored Government which, sitting at Wheeling on the 13th of May, 1862, gave its consent to the formation of the new State, 'according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the Convention which assembled at Wheeling on the 26th of November, 1861.'

"(c) That the Act giving such consent and the Legislature which passed it, depended for their validity upon the validity of the Wheeling Ordinance under which the Restored Government of Virginia was organized."

That is true.

Mr. Justice Holmes: What are you reading from?

Mr. Spooner: I am reading from page 7 of the Attorney General's reply brief, the brief which accompanies this new draft of the interlocutory decree.

"(d) That said Convention, and its acts, and the Government which it established, have been legitimated, by recognition by every department of the Government,—by the President of the United State in his official intercourse and dealings with the Governor and officials of said Restored Government, by approving the bill for the admission of West Virginia, and by his proclamation announcing the admission of the new State into the Union; by the Congress of the United States in the admission of Senators Willey and Carlisle elected by the Legislature of the Restored Government, by the passage of the Act approved December 31, 1862, admitting West Virginia into the Union, and by other acts; and by the United States Supreme Court, by its decision in *Virginia v. West Virginia*, 11 Wallace, p. 39, in which the Wheeling Convention and this very Wheeling Ordinance and the Wheeling Legislature of Virginia, are recognized as being a Convention, and Ordinance, and a Legislature of the Commonwealth of Virginia."

No man speaking for West Virginia could more strongly state our position than the learned Attorney General states it.

"We are forced by these considerations to conclude that it is too late now to question the binding effect of the Wheeling Ordinance."

And in addition to that, as I brought to the attention of your Honors yesterday, the legislation of Virginia, the first refunding act,

in its preamble referred to this Ordinance as the congenital liability, **the** foundation, the fundamental liability of West Virginia in respect **of** the contribution which she has to make to Virginia.

I suppose we may have liberty to file additional briefs if it is desired.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Argument of Hon. John G. Carlisle.



IN THE SUPREME COURT OF THE UNITED STATES.

VIRGINIA VS. WEST VIRGINIA.

ARGUMENT OF HON. JOHN G. CARLISLE.

For the Defendant.

Mr. Carlisle: If your Honors please, as this argument is upon a motion to enter a decree of reference, many questions, or at least several questions, which might be open for discussion on a final hearing of the case on its merits, are not open now, and so it seems to me that this discussion must be confined to very narrow limits.

A great deal has been said, not only in the oral arguments, but in the briefs, in regard to the alleged delinquency of West Virginia in the matter of making a settlement, and she has been somewhat severely criticised by counsel on that account. The facts are, as the Court judicially knows, as a matter of history, that on the 17th of April, 1861, the State of Virginia, or at least a large part of the people of Virginia, in convention passed an ordinance to secede from the Union, and a war ensued between the Government of the United States and the State of Virginia and the other States united with her in the South, which continued until 1865. Of course it was not possible for West Virginia to settle the debt, or to take any steps towards its settlement, during that period. All the records, all the vouchers, all the documents, of every kind, relating to this public debt and having a bearing upon the question as to West Virginia's just proportion of it, were in the possession of a hostile government; they were at Richmond, in Virginia, the capital of the Confederate States and the capital of the State of Virginia, and were wholly inaccessible to West Virginia.

At the close of the war, in 1865, the only government existing in Virginia was what was called the restored State government, which embraced only a small part of the territory, and for a long

time during the existence of that government it was impossible to make a settlement of this debt.

Then, in 1867, Congress passed an act declaring that this provisional, or so-called restored State government, which had continued and was the only one that was existing at that time, was illegal and unconstitutional; that it was no government at all, and a military government was established in its stead; and that state of affairs continued, I believe, until January, 1870. In addition to that, as has already been stated by my associate, Virginia brought an action in this Court in December, 1866, to determine the boundaries of the two States, and until those boundaries were determined, it was impossible to make any settlement under the terms of the Ordinance. That suit was decided by this Court in March, 1871. Immediately after that, as the Court will see from the answer filed by West Virginia, which gives a complete history of all the efforts that have been made to adjust this debt, West Virginia began to take action and to appoint commissions from time to time. One of these commissions went to Richmond and requested the auditor of the State to furnish copies of the vouchers and records, which he refused to do; and his letter refusing the request is exhibited with the answer. From 1873, after West Virginia had made these efforts to get into communication with Virginia, asking for commissions to be appointed by Virginia, and after she had made the effort to secure the necessary evidence upon which she could make a settlement, neither of the States took a single step towards the settlement of this debt until 1894. The reason was that Virginia was settling with her creditors at two-thirds of the debt and interest, and the claim that West Virginia was liable for one-third was an effective weapon with which she could beat down the demands of her creditors. So she took no steps whatever from 1871 to 1894, although West Virginia had, after 1871, and up to 1873, endeavored to secure a settlement. But in 1892 Virginia had completed the settlement with her creditors for two-thirds of the debt, and then she began to move in regard to a settlement with West Virginia; and what did she do? Her legislature passed a joint resolution on the 6th of March, 1894, which provided for the appointment of commissioners to settle the debt with West Virginia. That was the first step taken by Virginia since 1871 with regard to this matter. But it was provided in that resolution:

“But said commission shall not proceed with said negotiation until assurances satisfactory to the commission shall

have been received from the holders of a majority in amount of said certificates, exclusive of those held by the State through the agency of the board of education and sinking fund commissioners, that they desire the said commission to enter into and undertake such negotiation, and will accept the amount so ascertained to be paid by the State of West Virginia in full settlement of the one-third of the debt of the original State of Virginia which has not been assumed by the present State of Virginia. But said commission shall in no event enter into any negotiation thereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State, which she has already provided for as her equitable proportion thereof."

That was the only kind of negotiation proposed by Virginia, and was in fact no negotiation at all. It should not be entered upon except upon the basis that old Virginia's share of the debt was only two-thirds. Of course, if her share was only two-thirds, it followed necessarily that West Virginia's share was one-third. That part of the resolution has never been repealed to this day. There was a joint resolution passed in 1900 which authorized the same commission to bring a suit or to make a settlement, but this clause of the joint resolution passed in 1894 was not then repealed and has never been repealed, either in terms or by implication.

Some resolutions were read yesterday showing that West Virginia had refused to enter into negotiations. The first resolution ever passed by the legislature of West Virginia refusing to enter into negotiations with Virginia with relation to this debt was passed in 1895, after the passage of the resolution of Virginia which required her to enter into negotiations upon the basis I have stated. Here is the resolution:

"House Joint Resolution No. 10. Concerning the Virginia Debt. (Adopted February 7th, 1895)."

That is just eleven months, almost to a day, after Virginia had passed the joint resolution requiring negotiations to be conducted on the basis that she owed only one-third of the debt. It reads:

"That this Legislature hereby declines to enter into any negotiation with the debt commissioners, or commission appointed under a joint resolution, adopted by the General Assembly of Virginia, in the month of March, 1894, looking to the settlement of the Virginia debt question, on the basis set forth in said joint resolution."

Afterwards there were others declining, but all of them, as I have stated, were passed after this arbitrary basis had been laid down by the State of Virginia, which precluded free negotiation and fixed the amount substantially which West Virginia was to pay.

Mr. Conrad: Mr. Carlisle, you know that the Virginia Legislature has frequently, by joint resolution, denied that any liability for any part of this debt existed.

Mr. Carlisle: Yes, under the Ordinance; I was going to speak of that. In 1871 when West Virginia appointed a commission which, as I have said, went to Richmond, but could get no information, it then assembled at Parkersburg—

Mr. Conrad: To be entirely accurate, that commission called upon the auditor of Virginia to furnish them full copies of all records. The auditor said he had no clerical force with which to make the copies and no money with which to do it, but that the books were all open to that commission and they could make any copies they wanted.

Mr. Carlisle: I am not now criticising Virginia; I am simply accounting for the delay about which complaint has been made. The commission went there and attempted to secure these copies from the auditor, and he did not furnish them. I am not saying whether he was right or wrong, but it is a fact which produced delay; and then this commission reported the fact to the West Virginia Legislature, that it had attempted to procure the copies, and being unable to do so, it had proceeded to make an investigation itself as best it could, with such information as it had; and that commission found that West Virginia was indebted about \$953,000, I think. Then, in 1873, Virginia having been quiet all this time, the Legislature of West Virginia—

Mr. Justice Peckham: What year was that when the \$900,000 accounting was made?

Mr. Carlisle: 1871, but that settlement was not made upon the basis of the Ordinance. The Commission reported, but no attention was ever paid to it by the Legislature of West Virginia, as it did not conform to the Ordinance, and the commissioners themselves reported that it was incomplete for want of the necessary data.

In 1873, two years after that report, when Virginia was still silent and inactive, the Legislature of West Virginia passed a joint resolution directing the finance committee of the Senate to make an investigation of this matter, and its report is attached

to the answer. It undertook to follow the Ordinance, but I must say frankly that it did not follow it in all respects, and the result of its investigation would not be satisfactory to me personally. It found what was stated by counsel for the plaintiff yesterday, that upon a settlement West Virginia would be entitled to credit—not that Virginia would owe West Virginia, because she has no claim against Virginia—but that West Virginia had over-paid \$512,000, not \$560,000, as was erroneously stated yesterday. That report was made to the Legislature, and thereafter the Legislature of that State passed several resolutions, denying any indebtedness at all, if a settlement was made under the Ordinance.

Mr. Conrad: It does not limit it to a settlement under the Ordinance, it denies any liability whatever.

Mr. Carlisle: I have the answer here. The answer states—it is quite long and I will not detain the Court by reading from it—but it states that West Virginia is now ready and willing, and has always been ready and willing, to settle the debt under the terms of the Ordinance. This Senate committee had as its chairman Mr. Bennett, who was the auditor of the old State of Virginia for several years before the war, and all through the war, up to the evacuation of the City of Richmond in 1865. The ex-auditor of the State of Virginia, who was more familiar with the financial records of the State than any other man, was the chairman of this committee of the West Virginia Senate which made this investigation, and the report to which I have just referred was signed by him. After that, the Legislature of West Virginia denied that the State was indebted to Virginia on account of the public debt.

This is, in brief, the history of the attempts to settle this debt between the two States, and I submit to the Court that when your Honors read that history, as it is set out in the answer, you will not be disposed to criticize West Virginia very harshly. I think I was justified in making the statement that old Virginia did not want West Virginia's just proportion of that debt ascertained, or settled, or made public, until she had settled with her creditors in 1892, upon a basis of two-thirds; it was an argument to the creditors to induce them to scale down their claims against old Virginia herself, which they did.

My associate has gone over this case so thoroughly that I am at a loss to know what topics I ought to take up. It is now conceded by the Attorney General, the official representative of the

State of Virginia, the plaintiff in the action, that the Ordinance is valid and must govern in the making of the settlement. That would seem to eliminate all discussion upon that question, and yet some suggestions have been made in the argument which it may be proper to notice. I want to call the attention of the Court, however, before passing to that, to one other point.

Mr. Anderson: I hope my silence will not be construed into an acquiescence in the correctness of that statement.

Mr. Carlisle: I will not read your statement again; it has already been read by my associate. It is as plain an expression as can be made in the English language.

Mr. Anderson: I stand by that.

Mr. Carlisle: That is all we ask. We will be perfectly satisfied if the Court will stand by the propositions so clearly stated by the Attorney General who officially represents the plaintiff. I want to call the attention of the Court, however, to one statement made by the Attorney General which is very forcible and ought to be conclusive upon one point; and it is absolutely correct. It is this: The Attorney General has spoken of the act of Virginia of May 13, 1862, and he might have stated there, as he does afterwards state in his brief, that there was another act passed by the Virginia Legislature on the 6th day of December, 1862, after the House of Representatives in Congress had passed the bill for the admission of West Virginia, with the provision in it that the constitution should be changed with reference to the subject of slavery. On the argument on the demurrer considerable stress was laid upon the fact that the constitution which was before the Legislature of Virginia, when that body passed the act of May 13, 1862, asking for the admission of the State, had been changed afterwards by Congress. Our reply to that was that it was not changed in respect to anything connected with the Ordinance, that it was changed simply by requiring the new State, by a vote of its people, to prohibit slavery or provide for a gradual emancipation of the slaves; but that act with that provision in it had passed the House of Representatives, and while it was pending in the Senate, the Legislature of Virginia on the 6th day of December, 1862, passed a joint resolution and sent it to the Senate of the United States, asking that body to pass the act for the admission of the State of West Virginia into the Union with this change in it, so that the argument which was made here, even if it had any force, cannot be urged now, because Virginia approved of the admission, agreed to the separation and the ad-

mission of the State into the Union, after that change had been made in the bill pending in Congress. The Attorney General says:

“That the Act giving such consent and the Legislature which passed it, depended for their validity upon the validity of the Wheeling Ordinance under which the Restored Government of Virginia was organized.”

The very body which Congress recognized as competent to give the consent of Virginia to the creation of a new State within the limits of her territory, depended for its validity, according to the Attorney General, upon this Ordinance; but this is now controverted by one of the counsel who has addressed the Court. It is neither controverted nor admitted by the counsel who addressed the Court yesterday, and who stated all his propositions hypothetically. One of the counsel denies the validity of the Ordinance absolutely and assails it, not because it is illegal, not because the Government which passed it has not been recognized by all the political departments of the United States, but because it is unfair, he says; and another reason—

Mr. Conrad: Oh, no.

Mr. Carlisle: And because, as I understand him it was substantially enacted and promulgated by the same men who formed the new State, or who controlled the new State, and who adopted the constitution of the new State; but we submit that is a matter which this Court can not take into consideration.

Mr. Conrad: That is a matter with which the plaintiff itself had no power to deal.

Mr. Carlisle: With all due respect to my friend, I do not think we need argue that question. Section 9 is a part of the Ordinance just as much as any other section, and as the Attorney General says, the whole structure of the restored Government which followed depended for its validity upon the validity of this Ordinance, not a part of the Ordinance, but the whole Ordinance, and the whole Ordinance was before Congress when the act for the admission of West Virginia was passed. I have in my hand the report made by the Committee on Territories to the Senate of the United States to which the bill had been referred, and the copy of the Ordinance in full accompanies the report.

It has been suggested, rather than argued, that perhaps Congress did not give its assent to the Ordinance, because it was not recited in the act of Congress for the admission of the State or referred to in it. If that was a sound argument, then no part of

the Ordinance is valid, because no part of it is referred to in the act of Congress; but this Court has said that it is not necessary that an act of Congress providing for the admission of a new State into the Union, when it has been formed within the limits of another State, and a compact exists, should restate the provisions of the compact. The act of Congress admitting the State into the Union under a constitution formed in pursuance of this compact, was necessarily an approval and ratification of the entire compact and of every step that was taken in the process of forming the new State, and especially when it is shown by this official document, of which the Court will take judicial notice, that the Ordinance was before the body which passed the act as reported to it by one of its committees. This Court has held that the consent of Congress may be given previously to the compact, or it may be given afterwards, and that it may be inferred, from the mere act of admitting the State into the Union. There can be no force in the argument that the whole Ordinance was not approved by the act of Congress when it admitted the State into the Union which was created under that Ordinance.

Mr. Conrad: Ten sections of the Ordinance had already been completely executed when this matter was before Congress. It was the 9th section alone that remained executory, and of that Congress took no notice.

Mr. Carlisle: The act of admission took no notice of the others, either.

Mr. Conrad: Because they were executed.

Mr. Carlisle: My argument is that the Ordinance is a whole, and that Congress did not, by the admission of West Virginia into the Union, approve a part of it and reject the remainder. As has been stated here very forcibly, by one of the counsel for the plaintiff, the Ordinance was the genesis of the State government; it was the foundation upon which the whole proceeding was based; it was before Congress, and knowing what the compact was, knowing what all the provisions of the Ordinance were, the State of West Virginia was admitted into the Union as a State upon an equal footing with the other States.

Mr. Justice Harlan: When did the Ordinance and the constitution ever get any validity?

Mr. Carlisle: The constitution was submitted to the people and adopted by their votes.

Mr. Justice Harlan: It did not, then, become a valid instrument.

Mr. Carlisle: No, not until Congress admitted the State into the Union. There were people there and a constitution was framed for their future government, but the constitution was not in force, because there was no state yet. The constitution and the ordinance took effect only when Congress admitted a State into the Union.

Mr. Justice Harlan: The Ordinance took effect immediately, by what authority?

Mr. Carlisle: By the authority exercised by the Wheeling convention.

Mr. Justice Harlan: By what authority did it act?

Mr. Carlisle: The people of West Virginia—the history of the matter is well known—assembled; they called themselves the people of Virginia, because it was Virginia; a large part of the people of Virginia in that troublesome time finding that they had a government at Richmond which had severed its political relations with the general Government and with the other States which were adhering to the Union, finding themselves without a government with which they could have communication, finding themselves with a government hostile to themselves, waging war against them, determined that they would create the restored government, they would create another government to take its place, and all the political departments of the Government having recognized it, it is too late now for us to inquire by what authority they assembled.

I may be devoting too much time to this Ordinance, especially in view of the admission made by the Attorney General, as I understand his admission, but the Ordinance is of vital importance in this case, because it lies at the very foundation of the whole controversy; it is the bed-rock upon which the State of West Virginia is founded, and if it is invalid, West Virginia is not a State in the Union. This Court said in the case of *Green vs. Biddle*, when an argument was made that Congress had not approved the compact between the State of Kentucky and the State of Virginia:

“Now, it is perfectly clear that although Congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent State without the assent of Virginia or upon terms variant from those which Virginia had prescribed. But Congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed by a solemn act the consent of that body to the separation. The

terms and conditions, then on which alone the separation could take place, or the act of Congress become a valid one, were necessarily assented to; not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this is to deny the validity of the act of Congress without which Kentucky could not have become an independent State; and then it would follow that she is at this moment a part of the State of Virginia, and all her laws are acts of usurpation. The counsel who urged this argument would not, we are persuaded, consent to this conclusion; and yet it would seem to be inevitable, if the premises insisted upon be true."

Henry Clay was the attorney who insisted, on the argument of that case, that the compact had not been assented to by Congress.

Mr. Conrad: Was Congress concerned in any other feature of this Ordinance than that which gave the consent of Virginia? Need it have looked to any other?

Mr. Carlisle: It has been argued here that if there had not been an assumption of a just share of the public debt, the State would not have been admitted into the Union. It has been argued elaborately that that was the only condition inquired about on the floor of Congress.

Mr. Conrad: That is in the constitution, not in the Ordinance. I asked the question, would Congress have admitted this State into the Union if the constitution had not provided for the debt? The question that I now venture to ask you is, would Congress have looked any further into this Ordinance than to see that Virginia had consented?

Mr. Carlisle: I suppose it would have looked at the whole Ordinance.

Mr. Conrad: Chief Justice Taney, in a dissenting opinion in the Wheeling Bridge case, said not, that Congress would not look to the compact clause between Kentucky and Virginia, making the Ohio a free river.

Mr. Carlisle: Yet the Court held it was a valid compact.

Mr. Conrad: Oh, yes, but Congress could not be supposed to have looked to that feature at all in that case; that was a dissenting opinion, to be sure.

Mr. Carlisle: Certainly, but the court in that case decided that it was a good compact, whether Congress looked at it or not. Congress passed an act for the admission of Kentucky, with the con-

sent of Virginia, and there was a compact between the parties. I do not propose to go over the ground again to show how the compact in controversy in this case was entered into; that is known to the Court, and besides, it is stated fully in our briefs. In the case of *Wedding vs. Meyler*, 192 U. S., 573, 582, it is said:

“Under article 4, section 3, of the Constitution, a new State could not be formed in this way within the jurisdiction of Virginia, within which Kentucky was recognized as being by the words last quoted, without the consent of the legislature of Virginia as well as of Congress. The need of such consent also was recognized by the recital in the act of Congress. But as the consent given by Virginia was conditioned upon the jurisdiction of Kentucky on the Ohio river being concurrent only with the States to be formed on the other side, Congress necessarily assented to and adopted this condition when it assented to the act in which it was contained. *Green vs. Biddle*, 8 Wheat. 1, 87. Thus, after the passage of the two acts, it stood absolutely enacted by the powers which between them had absolute sovereignty over all the territory concerned that when states should be formed on the opposite shores of the river they should have concurrent jurisdiction on the river with Kentucky. ‘This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?’ *Pennsylvania vs. Wheeling & Belmont Bridge Co.*, 13 How., 518, 566.”

It seems, therefore, to be a well recognized rule in this Court that Congress, by the admission of a State into the Union, approves and ratifies the steps which have been taken to create the State.

Mr. Justice White: Let me ask, for information, is there any act which concerns this case particularly? Is there anything done by Congress which would have been construed as a condition of the State of Virginia as organized, and as an approval of this compact prior to the act of Congress which admitted West Virginia into the Union?

Mr. Carlisle: Any action of Congress on that particular subject?

Mr. Justice White: Yes.

Mr. Carlisle: Not that I know of. They had admitted John S. Carlisle and Mr. Willey as Senators from the restored State, and quotations have been made here from their speeches in that body. Representatives from the restored State had also been admitted to seats in the House.

Mr. Justice White: Not before the adoption of the constitution?

Mr. Carlisle: Yes, before the adoption of the Constitution of West Virginia.

Mr. Justice White: Before the adoption of this constitution by Congress, the ratification and admission of this constitution?

Mr. Carlisle: Yes, they went further.

Mr. Conrad: Senators from Virginia, not West Virginia, were received in Congress on the 25th day of July, 1861.

Mr. Carlisle: Several months before this constitution was framed.

Mr. Justice White: That answers my question.

Mr. Conrad: But the State had been recognized before that by the Secretary of War, some time before.

Mr. Carlisle: Yes. The restored State was represented in the Senate and in the House, before the Ordinance of 1861 was passed, but your Honors will bear in mind that the consent of the legislature of the State is not required by the Constitution of the United States to make a compact with other States. The consent of the legislature of the State, however, is required to form the new State, to create the new State within its territory. The constitutional provisions are separate.

Mr. Conrad: Mr. Lincoln denied that. You will find, in Nicolay and Hay, the action of the cabinet upon this matter, the 6th volume of Nicolay and Hay.

Mr. Carlisle: The Constitution of the United States provides that:

“No State shall, without the consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into an Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”

There is nothing about the legislature giving consent to a compact. The States may make compacts by conventions, as Kentucky did, I believe, when a compact was made with Virginia. The constitutional convention in Kentucky accepted it and put it in the constitution of the State. The other clause is different; it provides that Congress may admit new States into the Union from time to time, but that no State shall be created out of the territory or within the jurisdiction of another State without the consent of the legislatures of both States. So that the validity

of this compact does not depend upon anything that the legislature of Virginia did or could do to affect it; except that perhaps the legislature might have taken some action to withdraw the proposition made to West Virginia before it had been accepted, or before it had been fully carried out; but that is a question which does not arise in the case.

The substitute decree now proposed by the Attorney General for the plaintiff follows the Ordinance almost strictly, except that it uses the words "fairly borne," which, I suppose, mean the same thing.

Mr. Conrad: I have never had the opportunity of examining that; I never heard of it.

Mr. Anderson: That is on the basis that it is made on the Wheeling Ordinance.

Mr. Carlisle: You say it ought to be made on that basis?

Mr. Anderson: No.

Mr. Carlisle: Well, I so understand it, and I must stand on that opinion, which I think is correct.

Mr. Conrad: Has that been filed?

Mr. Carlisle: I do not know.

Mr. Conrad: It has not been shown to me.

Mr. Chief Justice Fuller: Is that not the pamphlet that was put on the files here a few days ago? What is that?

Mr. Carlisle: This is a proposed substitute for the second clause of the decree heretofore presented by the State of Virginia.

Mr. Justice White: Has that been handed to us?

Mr. Carlisle: I do not know, sir; I saw it first yesterday morning. The Attorney General says he sent it to my house several days ago, but I was absent and did not see it.

Mr. Anderson: In the event that the Wheeling Ordinance shall be adopted by the Court as the basis of settlement.

Mr. Chief Justice Fuller: Do you wish that to be looked at and examined by the Court?

Mr. Anderson: I wish to use this in argument, if your Honor please.

Mr. Chief Justice Fuller: Let it be distributed.

Mr. Anderson: It has been handed to the Court.

Mr. Carlisle: I have here what my associate read from; it was a brief. This is a separate and distinct paper, which is offered now, as I understand it, as a substitute for the second clause of the decree heretofore proposed by Virginia. The de-

cree originally proposed, as your Honors will perceive, throws the whole question open before the master; it does not state any basis at all upon which he shall make the settlement, but leaves him to decide all questions of law; not only to take the account, but decide upon what basis the account shall be taken, and provides that either party, at his own expense, may have him take alternative accounts. That is to say, if West Virginia wants an account taken under the Ordinance, she would have a right to go to the master and deposit money—I think \$3,000 is what Virginia has to deposit—and have him take the account under the Ordinance. West Virginia would be at the expense of that; old Virginia would be to no expense. She holds the contracts of the owners of the certificates in which they bind themselves to defray all expenses in connection with this proceeding. This substitute provides that the master shall ascertain:

“What is the just amount and proportion of said debt, including the interest thereon, which should now be apportioned to, and paid by, the State of West Virginia? Such amount and proportion of said debt the master will ascertain by charging against West Virginia:

“(1) All expenditures made by the State of Virginia within the territory which now constitutes the State of West Virginia since any part of said debt was contracted.

“(2) Such proportion of the ordinary expenses of the government of Virginia since any part of said debt was contracted as was fairly assignable to the counties which were erected into the State of West Virginia.”

It is substantially the Ordinance, except instead of using the words “justly” or “equitably” it says “fairly,” which, I suppose, means the same thing.

Mr. Anderson: Yes.

Mr. Carlisle: Then as to the ordinary expenses, the proposed substitute provides:

“In ascertaining this, the master will take as the basis or criterion upon which the apportionment of said expenses shall be made the average total population of Virginia, excluding slaves, as nearly as the same can be determined from the United States Census for each of the decades in which such expenses were incurred and paid.”

Our decree, which we have proposed as an alternative to their original decree, provides that the whole population shall be taken into account, not excluding slaves. There were comparatively very few slaves in that part of the territory which afterwards con-

stituted the State of West Virginia, whereas they constituted a very large part of the population in Old Virginia. Government is for people; it is the duty of the government to protect the people to govern the people, and we think that the true rule is to take the entire population. Slaves had to be governed by the law as well as the white population. In fixing the basis for representation in the House and Senate of Virginia three-fifths of the slaves were included. Therefore, the voters in that part of the territory which now constitutes the State of Virginia had far more power in the legislature than the same number of people living in that part which now constitutes West Virginia could possibly have, because of the fact that nearly all the slaves lived within the limits of what is now Virginia.

Then the proposed decree provides that the master shall ascertain the interest which West Virginia shall pay on her proportion of the public debt. I do not want to repeat the arguments made by my associate, and yet I think it proper to make one or two suggestions on that subject. The method of settlement agreed upon and embodied in the 9th section of the Ordinance has no relation to the actual amount of the public debt.

Mr. Justice McKenna: Say that over again.

Mr. Carlisle: I say that the method of settlement provided for in the 9th section of the Ordinance has no relation to the amount of the public debt of Virginia existing on the first day of January, 1861. In other words, it is wholly unnecessary, in making a settlement under the terms of that Ordinance, to ascertain what the amount of Virginia's public debt was on the first of January, 1861. If Virginia, on that date, only owed five millions of dollars, the Ordinance would be the basis of the settlement, and the amount which West Virginia would be found liable for would be just the same, except that if the debt had been larger, Virginia might have expended a larger sum of money in West Virginia with which that State would be charged in the settlement; but West Virginia did not assume to pay the creditors, but she assumed to pay Virginia a certain sum of money to be ascertained in a certain way.

Mr. Justice White: Then, if that provision for settlement has no relation and does not concern itself at all with a just proportion of the public debt, which you say is the case, is there not an absolute incompatibility of the constitution with the provision of the Ordinance?

Mr. Carlisle: This Court has said they must be read together.

Mr. Justice White: That is not answering the question, saying the question has been decided. I take it that the demurrer does not foreclose the question; I am asking it as a generic question, if it be that the method provided in the Wheeling ordinance has no relation and no concern with a just proportion of the public debt, then is the necessary induction from that that there is an irreconcilable conflict between the constitution and the Wheeling Ordinance?

Mr. Carlisle: Unless, if your Honor please, I am right in my contention that the two papers must be read together, and that the legislature was to make the settlement according to the method prescribed in the 9th section of the Ordinance; if that is true, there is no conflict. If you do not take them together, there may be a conflict between them, and West Virginia then would have voluntarily assumed to pay a just proportion of the public debt without regard to the Ordinance. What I mean by saying that the method of settlement has no relation to the public debt is this, that suppose the master should find the public debt of Virginia on the first day of January, 1861, was one hundred million dollars; West Virginia would not be required to pay a cent more under this method of settlement than she would if it was ten millions of dollars, because a certain result is reached by this calculation, and whatever that result is, it fixes the amount that West Virginia is to pay, without any regard to the amount of the public debt. The parties, when they entered into this contract, knew what the public debt was; it was about thirty-three millions of dollars. Now, they concluded that the public debt being thirty-three million dollars, or thereabouts, a settlement made upon this basis would result in charging West Virginia with her just share of that debt.

Mr. Conrad: They propose to ascertain, under the Ordinance, what a just or equitable proportion was, by deducting the amount of appropriation and the amount of taxes.

Mr. Carlisle: Oh, no, charging West Virginia with State expenditures and her just proportion of ordinary expenses.

Mr. Conrad: That is the Wheeling Ordinance.

Mr. Carlisle: Of course, the Court knows what the Ordinance is. Therefore, while we do not object to the provision in the decree that the master shall ascertain the amount of the public debt on the first day of January, 1861, it has no bearing whatever upon the settlement, no bearing whatever upon the amount which West Virginia may be found liable for, and the counsel on the other

side agree to that. West Virginia, then, did not agree to pay a part of the public debt to the creditors or a part of the public debt to Virginia; she agreed that because there was a public debt which had been incurred by Virginia while she was a part of that State, she would pay a certain sum to Virginia, which would be ascertained by the method prescribed in the Ordinance. In other words, it was a primary obligation to the State of Virginia to pay her whatever might be found by this process. Does that bear interest until it is ascertained? Can you go back to 1861, including the ten years when there could be no settlement made, and charge West Virginia interest on this liability, not a debt, because the debt begins when the sum is ascertained, and West Virginia's constitution provides for that, as has already been shown; the legislature was to ascertain the amount and provide for the payment of the amount ascertained, with interest thereon, not that the legislature should ascertain what interest had accrued upon the sum which had not yet been ascertained, during the last forty-five years, but provide, by creating a sinking fund, for the payment of the principal and interest which should accrue upon it after it had been ascertained.

The doctrine that a State is not liable for interest, unless it has expressly contracted for it by a statute or otherwise, is so well settled in this country that it is hardly necessary to cite authorities. I have a long list of authorities here which I will not take the time to read. However, I will call the attention of the Court to them.

Mr. Anderson: Furnish us a copy of that.

Mr. Carlisle: I would like to have them in the record.

Mr. Anderson: You can furnish us a copy of them.

Mr. Carlisle: This list of authorities begins with the case of *United States vs. North Carolina*.

Mr. Chief Justice Fuller: Will you hand that to the clerk?

Mr. Carlisle: Yes sir, I will do that; the gentlemen on the other side will probably desire to see it.

Mr. Chief Justice Fuller: And have copies for each member of the Court.

Mr. Carlisle: They are all on one sheet; it was prepared for a brief.

Mr. Chief Justice Fuller: One for each member of the Court is enough.

Mr. Carlisle: I can have it printed, then.

Mr. Chief Justice Fuller: Yes.

Mr. Carlisle: Yes sir, I will do that.

Mr. Justice Moody: I would like to ask a question for my own information. If I understand you correctly, you agree to the form of the decree proposed by the State of Virginia with three exceptions, first, the amount of the public debt; second, the question of interest upon the balance found due; and third, the question of including the slaves in a basis of settlement. Otherwise than those three things, you do not contest the decree proposed by the State of Virginia?

Mr. Carlisle: And I do not really contest that that part which directs the master to ascertain the amount of the public debt, because it is not material and it is easily ascertained. The statement of Mr. Justice Moody is correct as to my position with reference to this proposed substitute, but there are some things in the original proposition made by the State of Virginia to which we object. For instance, that provides, as I have just said, that the master may take alternative accounts, provided the party who asks for them pays for them, and because, under that decree, everything is cast before him without any rule for his guidance whatever, and it provides also that the acts and the public records of the two States shall be competent evidence before the master. We have no objection to that except to this extent: the State of Virginia adopted an ordinance on the 17th of April, 1861, by which, as I have said before, it severed its political relations with the United States Government and with the other States adhering to the Union, and after that date, whatever Virginia did was *ex parte*, so far as West Virginia was concerned; practically West Virginia was no longer a part of that State, and her acts since that time ought not to bind West Virginia.

Mr. Anderson: We simply want to introduce them as evidence.

Mr. Carlisle: You say they may be objected to as immaterial, but they must be admitted if they are immaterial. I understand it to be a fact—I state it subject to correction—that in 1861 or 1862, after the State had passed the ordinance of secession, a commission, or some official of the State, made out a very long and complicated account of the public debt and the expenditure of the money. Am I correct?

Mr. Conrad: Mr. Bennett, to whom you have referred, has made an official report as Auditor of Virginia, down to September, 1862, which leads to quite different results from the report he made later.

Mr. Carlisle: Yes, of course. Mr. Bennett was at that time

an official of the State of Virginia, but we think that some period ought to be fixed after which the public acts and records of the State of Virginia should not be received as evidence against West Virginia, because the two States were in fact entirely separate after April 17, 1861.

Mr. Conrad: They became separate in June, 1863.

Mr. Carlisle: It seems to me that the question of interest is one which cannot only be appropriately postponed until the final hearing of the case, but ought to be postponed. When the master has found the amount and reported to the Court, it will not be difficult then for the Court to decide whether it shall bear interest. There is no interest to be counted on the money expended in West Virginia, no interest to be counted on her just proportion of the ordinary expenses, no interest to be counted on the money which she paid into the treasury; the master will simply take the original sums and include them in his report.

Mr. Justice White: Let me ask you a question. I do not know that it has any concern with what you have said, but there is some claim made in the original application made by Virginia for a decree, concerning some property passing under some act. Is that necessarily involved in what you have said?

Mr. Carlisle: I am much obliged to your Honor for calling my attention to that. I had thought Mr. Spooner fully discussed that question. Your Honor refers, of course, to the acts of February 3 and 4, 1863, which were passed by the legislature of Virginia after Congress had passed the act admitting West Virginia into the Union. One of those acts simply directs the proper official of the State, the auditor, I think, to pay over to West Virginia certain amounts of money then in the treasury of the restored government of Virginia. That act says nothing about a settlement with West Virginia for that money, and in fact, it was West Virginia's money in this sense, it was money which had been collected by the restored government of Virginia from the counties which now constitute the State of West Virginia. It was in the treasury when Congress passed the act for the admission of the State into the Union, and the legislature of Virginia provided it should be paid over to West Virginia; it was her own money. The act shows this; the other act purports to transfer to West Virginia certain property.

Mr. Conrad: All property of every description, real and personal.

Mr. Carlisle: Yes; real and personal. The public land I sup-

pose, you have reference to. That act provides that this shall be accounted for in the settlement hereafter to be made with West Virginia, which, I presume, means the settlement under this Ordinance. Our contention is, and I think we are fully sustained by the authorities on international law, that the mere fact of the separation of the State from the mother State, unless there was some provision to the contrary in the original agreement or compact, conferred upon the new State the public property within its limits, that that was a part of what Virginia consented should be taken into the new State.

Mr. Justice White: Let me ask you, was this public property, used for the purpose of governmental business, Mr. Carlisle?

Mr. Carlisle: I suppose so; it says "buildings," and mentions other property also.

Mr. Justice White: It was to be land which the State used?

Mr. Carlisle: Yes, it says "lands;" and several other things, buildings and lands and roads, bridges and uncollected taxes.

Our contention is that as to the public property owned by Virginia within the limits of the new State it passed by operation of the separation itself to that State, the land, the charitable institutions, the roads, the bridges, and there was some stock in banks localized within the State of West Virginia; there is some doubt in my mind, and there has always been, whether Virginia's shares of stock in banks located in West Virginia, the old State not being the sole proprietor of the bank, would pass by the mere act of separation, but the public property localized did pass, unquestionably, and all the effect that this act of 1863 has, is as evidence of title; it does not confer title. West Virginia had the title by reason of the separation. This decree, the first one proposed by Virginia, provides that the master shall take that property into account, and I suppose, charge West Virginia with its value as if this act passed the title, or in other words, as if this had been the first time West Virginia acquired it. We say that if West Virginia is to account for this property at all, or any part of it, it is to be accounted for under the terms of the Ordinance. That is to say, West Virginia is chargeable with the money which old Virginia expended within her limits during the time that this debt was created, which might include whatever money Virginia expended within the territory which now constitutes West Virginia, in procuring this property.

Mr. Justice White: That would cover, undoubtedly, the court houses and other things, but I am speaking of land, now; for in-

stance, land that Virginia owned from her colonial times, which passed to her as a sovereign.

Mr. Carlisle: That passed by virtue of the separation, according to most of the authorities on international law, and especially Hall. Your Honors will find it in his work, I think section 27, page 58—I have a long extract from it here, but will not read it. All those things go along with the territory; they go to the new State, and why should they not? What would be the situation if they did not? The State of Virginia would own the court houses and the charitable institutions and the roads and the bridges in West Virginia; and the public lands if there were any. West Virginia would have no jurisdiction over them. One State would own all this property in another State and control it absolutely under its own laws, without regard to laws of the new State. Virginia would continue to administer, I suppose, the affairs of the charitable institutions, continue to keep the bridges and roads in repair. It seems absurd that such consequences could legally follow the consent to the formation of a new State. It must go out as a State and must come into the Union endowed with all the rights and privileges of a sovereign State over the territory within its limits, and if Virginia owned territory there, it went to West Virginia just as the public lands in Texas would have gone to the United States by the annexation if the act of Congress had not provided that the old State or Republic could retain them.

Mr. Conrad: Do you contend that the settlement provided for in the acts of the Assembly can be made within the terms of the Wheeling Ordinance?

Mr. Carlisle: I think there is no doubt of it. I understand your argument is that it would not be a fair settlement, but I will not discuss that.

It has been argued that the provision contained in the constitution of West Virginia assuming an equitable proportion of the public debt is inconsistent with the Ordinance of the Wheeling Convention on that subject. Now, the Ordinance provided that the new State should assume a just proportion of the public debt created prior to the 1st of January, 1861, to be ascertained, first, by charging to the new State all state expenditures within her limits during the time when the debt was being created; second, by charging to the people of the new State, or to the new State, their just proportion of all the ordinary expenses of the whole State during the same time; and third, by crediting the new

State with all the money paid into the State treasury from the counties included in it during the time the debt was being created.

Mr. Justice White: If the words "ordinary expenses" be construed as relating merely to the ordinary expenses for carrying on the government, and exclude all the sums spent by the State of Virginia for public works and public improvements—

Mr. Carlisle: Within her own borders.

Mr. Justice White: Within the borders of the State, her own borders, West Virginia being a part of her territory, and thereby, under the calculation now made by West Virginia, brought Virginia out \$500,000 in debt to them, you say she had no claim for it; your conception is that that coincided with and was coincident with an obligation to pay a just proportion of the debt?

Mr. Carlisle: It is a part of the Ordinance, whatever construction the Court may put upon it.

Mr. Justice White: That question addresses itself to whether Congress in recognizing the situation, may not well have said: "I will not ratify unless there is a just proportion paid," and thereby eliminated that thing, which, in the very nature of things, was destructive of the obligation to pay a just proportion. Of course, I am not dealing now with the admissions of the State of Virginia made at the bar by the Attorney-General in the briefs.

Mr. Carlisle: Of course, the only way Congress could say that would be in its legislation; we have no means of ascertaining what Congress thought about it except from the act passed by that body admitting West Virginia into the Union under that constitution. What some member of Congress may have said upon the floor in expressing his own individual views is wholly immaterial here; in fact, I do not know what they did say.

West Virginia is to be charged, then, with all the State expenditures made within that territory by the State of Virginia during the period that this debt was being created, and her just proportion of the ordinary expenses of the State during the same period. The court will see that such a provision, of course, makes West Virginia account for every dollar expended there for internal improvements within her limits. Therefore, we are obliged, under the terms of this Ordinance, to separate ordinary expenses from other expenses, because if you first charge West Virginia with all the money expended by the State of Virginia within the counties now composing that State, and then charge her with her just share of all the ordinary expenses of the whole State, you

may charge her twice for a large sum of money, because a large part of the ordinary expenses were also paid in those counties. So you have to separate them. The first class means, of course, those expenditures that we call "extraordinary expenses," expenses for internal improvements, for charitable institutions, for bridges and roads and various other things of like character. Then West Virginia is to have credit for the money she has paid in. That is the Ordinance, and it has been suggested that the provision of the constitution, article 8, is inconsistent with that, and is an absolute assumption of a just and equitable proportion of the public debt of Virginia without regard to the Ordinance or the method of ascertaining it. Now, I submit that this Court has taken a different view of it. This Court said, in its opinion overruling the demurrer, on page 433 of the printed record:

"The Act of May 13, 1862, was not made a part of the case stated in the bill, and its validity is denied by counsel for Virginia,"—

That is not the case now. It is admitted now, in the brief recently filed, that the legislature was properly called by proclamation by the governor.

"but it is unnecessary to go into that, for when Virginia, on August 20, 1861, by ordinance provided 'for the formation of a new State out of the territory of this State,' and declared therein that 'the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861,' to be ascertained as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its Legislature should 'ascertain the same as soon as practicable,' it referred to the matter of ascertainment prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it follows that what was meant by the expression that the 'Legislature shall ascertain' was that the legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained."

This Court did not treat that provision in the 8th article of the constitution of West Virginia as voluntary, or as a new and independent assumption of a just proportion of the public debt of Virginia.

Mr. Conrad: Was that question before the Court at all on demurrer, or argued before it?

Mr. Carlisle: - Undoubtedly, because we argued that under the constitution of West Virginia, which we contended, and in which contention we were overruled, that the constitutional provision formed a part of the compact. Our argument was that Virginia had made a proposition in the 9th section of the Ordinance and tendered it to West Virginia; that when West Virginia's convention assembled, which was the first time that State could speak upon the subject, it accepted that proposition with the addition to it, that the Legislature of West Virginia should be the tribunal to ascertain her just proportion of the debt, and that Virginia, subsequently by the passage of the act asking for the admission of West Virginia into the Union under that constitution, had agreed to this additional clause which the West Virginia convention had inserted in it. So we argued that the compact consisted not only of the 9th section of the Ordinance, but of the whole of the 8th section of the West Virginia constitution, including that part of it, of course, which provided that the legislature should ascertain the just proportion. Now, the Court discussed that very question, and said that the legislature was to ascertain it in the method prescribed by the Virginia convention, and that the legislature was not to sit as a court, as a tribunal, and hear the evidence and make the investigation by its members, but that it was to provide for the settlement "in the method prescribed." The Legislature could have appointed a commission, or it could have authorized the Governor alone, or any other official, to make the settlement, but it must be made in the method prescribed by the Ordinance. So, there is no inconsistency between the Ordinance and the constitutional provision as interpreted by the Court.

The second clause of the 8th article of the constitution of West Virginia, as has already been stated by my associate, constitutes no part of the assumption of the debt. That clause was simply a delegation of authority and a direction to the Legislature as to what it should do, that is, it should ascertain the State's equitable proportion of the public debt and provide for its payment by the creation of a sinking fund sufficient to pay the principal and interest within thirty-four years. The argument which I am trying to answer, if correct, would result in this, that, the Ordinance being out, because it is invalid, West Virginia's constitutional convention, being under no obligation to do it all, as it was not a condition upon which the new State was to be formed, or a condition upon which Virginia was to give her consent to its formation, voluntarily assumed to pay a just proportion of the public

debt. As was well said this morning, if that is true, then that provision constitutes the whole assumption, and what West Virginia volunteered to do was to pay her just proportion of the public debt to be ascertained by her own legislature and provided for by her own legislature. If the Ordinance is out, there is nothing in the case, except the 8th section of the constitution, pledging West Virginia to pay her just proportion of the debt. It is true some argument has been made as to her liability under international law. I do not know where our friends on the other side found any international law to the effect that the obligations of a State divided should be apportioned ratably between the two parts according to territory and population; that is the argument—

Mr. Conrad: Not mine.

Mr. Carlisle: The argument on the demurrer; it is also relied on in the bill.

Mr. Conrad: No, I wrote the bill. I will say there are four grounds stated in that one section of the bill that relate to an admission of liability alone, and this is instanced as one of the incidents to liability. That is the first section of the Wheeling Ordinance, that the State shall assume a just proportion.

Mr. Carlisle: How can this Ordinance be taken as a valid admission if the Ordinance is not valid?

Mr. Conrad: Because a man may make an admission in a deed that is fraudulent as to grantee and as to creditors. There is a solemn admission in the recognition of debts.

Mr. Carlisle: It is alleged that the new State included one-third of the territory, and one-third of the population. Now, in the books on international law, I venture to say that the words "territory" and "population" cannot be found anywhere in connection with the adjustment of the debts under such circumstances as exist here. They are not found in any of the quotations you made, Mr. Anderson; they are not found in any of the books I have read. What the authorities say is that, in the absence of an agreement on the subject, all debts shall be apportioned ratably without stating what the basis of apportionment shall be. Of course, each case would depend upon its own circumstances. But all the authorities are that if there is a special agreement, that rule does not apply, and Mr. Hall says, in his work on international law, that the rule does not apply in a case where a state or nation is divided and the old State still remains, or, as he expresses it, when its personality still continues. There, he says,

the new State goes out free from all the old obligations, but he admits it is a sound doctrine when applied to a case where a State or nation is so destroyed that all its parts are separated and the old State disappears, and then its separate parts, which represent the old State, must divide the pre-existing debts among themselves in the proper proportions.

Mr. Conrad: Some of the authorities hold that each party is liable for the entire debt.

Mr. Carlisle: I have seen no such authority.

Mr. Conrad: I ventured to cite them in the brief I have filed.

Mr. Carlisle: Let us see what you have cited. I know what you cited, the case of the division of the Persian Empire.

Mr. Conrad: No, I do not go that far back; I did not think Alexander's generals were called upon to pay any part of the debt, if there was any.

Mr. Carlisle: I think you did, Mr. Conrad. I do not want to make any misstatement, but I am quite sure I saw that in one of the briefs.

Mr. Conrad: I saw that somewhere, but it is not in my brief.

Mr. Carlisle: I think I saw it in your brief, but I may be mistaken. It was certainly in one of the briefs; it may be in the Attorney General's brief. It was a case, where, during Alexander's wars, the Persian Empire was divided, and ceased to exist.

Mr. Anderson: Grotius.

Mr. Carlisle: Yes, you quote from Grotius. There the old State was extinguished entirely, and the new States represented the whole of it, and of course they were responsible for the whole debt; they took the place of the old State.

In conclusion, I repeat the West Virginia constitutional provision cannot be regarded under the decision of this Court, or logically, I think, upon the historical facts connected with this subject, as constituting the entire compact. It was simply an acceptance of Virginia's proposition, with the addition to it that the Legislature of West Virginia should ascertain the debt and provide for its settlement, in the method prescribed by the Ordinance. The State of Virginia, in her constitution, had the same provision; that is, she had a provision that her legislature should provide for the settlement of the debt, but that did not take the place of the Ordinance, which, as we insist, is still in full force and must govern in making the settlement.

MEMORANDUM FOR DEFENDANT.

Showing State Not Chargeable with Interest.

It will be observed that in paragraph II of this draft of a decree the master is not only directed to ascertain the amount and proportion of said indebtedness, but "of the interest accrued thereon."

Counsel for the defendant object further to this paragraph because there is no legal ground for directing the ascertainment of interest. The State of West Virginia has not obligated herself in any manner for the payment of interest. The principal is well settled that a State is not liable to pay interest unless it has expressly contracted to do so.

In support of this proposition this Court, in *United States vs. North Carolina*, 136 U. S., 211, said:

"A State is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or by lawful contract of its executive officers."

Following the principle thus announced by this Court, many of the State courts have laid down in distinct terms the same proposition. Among the decisions of these courts are the following:

Sawyer vs. Colgan, 102 Cal., 293; 36 Pac., 583.

Hawkins vs. Mitchell, 34 Fla., 421, 422; 16 So., 316.

Molineux vs. State, 109 Cal., 380; 50 Am. St. Rep., 50; 42 Pac., 34.

Flint, etc., R. R. vs. Board of State Auditors, 102 Mich., 502; 60 N. W., 971.

Carr vs. State, 127 Ind., 204; 22 Am. St. Rep., 624.

In *Carr vs. State*, 127 Ind., 204, 22 Am. St. Rep., 624, this principle is announced as one of the points decided:

"A sovereign State is not bound to pay interest unless it has contracted to do so."

The court, in the course of its opinion in this case, says:

"In the case of *State ex rel. vs. Board, etc.*, 36 Ohio St., 409, it was held that in the absence of a promise to pay interest none can be recovered against a State, and that a State is not within the provisions of a general statute providing for the payment of interest in cases where money is wrongfully withheld from a creditor. The court put its decision upon the familiar rule that a sovereign is not bound by the words of a statute unless it is expressly named, and in support of its conclusion cited these cases: *Trustee,*

etc., *vs. Campbell*, 16 Ohio St., 11; *Joselyn vs. Stone*, 28 Miss., 753; *State vs. Kinne*, 41 N. H., 238; *Attorney General vs. Cape Fear, etc., Co.*, 2 Ired. Eq., 444; *Auditorial Board vs. Arles*, 15 Tex., 72; *State vs. Thompson*, 10 Ark., 61. In *Wightman vs. United States*, 23 Ct. of Cl., 144, the general rule was stated, and it was said: 'Hence there is no law fixing a rate of interest for all classes of the public debt, and a long-established public policy has been to pay interest only where it is a subject of express agreement or of positive enactment.' It was held in the case of *Tillson vs. United States*, 100 U. S., 43, that a statute referring a claim did not authorize a recovery of interest, in the absence of words expressly providing for the payment of interest. It is impossible to escape the effect of these authorities, and considerations may be readily suggested which increase their force. One is, that there is no right to coerce the payment of a debt due from a sovereign, and, of course, a sovereign may impose limitations upon its liability."

In a note appended to this case as reported in 22 American State Reports, at page 448, we find the following:

"With respect to the obligation of the State to pay interest upon its indebtedness, the principal case is well established by other authorities upon the same subject. In nearly and perhaps all of the States there are statutory provisions providing that moneys, after they become due, shall, in the absence of express contract to the contrary, bear the rate of interest specified in such statutes; but, acting under the old common-law rule that the king or sovereign is not bound by a statute unless expressly named therein, it has been uniformly held that these statutory provisions respecting interest did not apply to any obligation either of the State or of the national government, and therefore that interest is never allowed upon such obligations, in the absence of some special statute clearly manifesting the intention of the sovereign to be bound for the payment of interest upon the particular obligation or class of obligations under consideration (*United States vs. North Carolina*, 136 U. S., 211; *State vs. Thompson*, 10 Ark., 61; *State vs. Board of Public Works*, 36 Ohio St., 409; *State vs. Bank of Washington*, 18 Ark., 554; *United States vs. Sherman*, 98 U. S., 565; *United States vs. Bayard*, 127 U. S., 251; *Tillson vs. United States*, 100 U. S., 43; *In re Gosman*, 17 Ch. Div., 771; *Attorney General vs. Cape Fear N. Co.*, 2 Ired. Eq., 444; *Bledsoe vs. State*, 64 N. C., 392; *Trustee vs. Campbell*, 16 Ohio St., 11; *Joselyn vs. Stone*, 28 Miss., 753; *Wightman vs. United States*, 23 Ct. of Cls., 144)."

Supreme Court of the United States.

OCTOBER TERM, 1907.

Argument of Hon. William A. Anderson,
Attorney General of Virginia,
for the Complainant.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA, *Complainant,*

vs.

STATE OF WEST VIRGINIA, *Defendant.*

In Equity.—Original No. 4.

ARGUMENT OF HON. WILLIAM A. ANDERSON,

Attorney General of Virginia, for the Complainant.

Mr. Anderson: If your Honors please, a large portion of the time of the distinguished counsel who last spoke in this case (Mr. Carlisle) was consumed in discussing questions which have little or nothing to do with the merits of the cause. The questions which he discussed at great length related to the occasion of the delay in bringing about a settlement between the two States. The proposition he attempted to maintain was that West Virginia was no more culpable than Virginia for this delay. I cannot see that that has any bearing, directly or indirectly, upon the important issues of this case; but if I were disposed to go into a discussion of that matter, I think I could satisfy your Honors, and I think a careful examination of the record will convince your Honors, that the gentleman is mistaken in his position.

He says that the reason that West Virginia has taken no steps towards the settlement of this debt since 1871 is because of Virginia's attitude to the question. That statement is in conflict entirely with the allegations of his answer. At pages 14 and 15 of the defendant's answer the defendant makes the following averment:

"The State of West Virginia has never receded from the

provisions contained in section nine of the Wheeling Ordinance with reference to the settlement of this respondent's just proportion of the public debt of Virginia, but has uniformly adhered thereto throughout her history as a State; and the resolutions adopted by her Legislature in recent years in which she declared that she did not owe the State of Virginia anything on account of said public debt were based upon the said report of the Senate Committee made in 1873 as aforesaid, and upon Virginia's persistent refusal to recognize the basis of settlement provided for in said ordinance as the just and true one upon which a settlement between the two States could legally and equitably be made."

If your Honors please, as stated in the answer, the reason why there has been no settlement of this debt has been that West Virginia, or one house of her General Assembly, appointed a committee of its own body to examine into this question, and that committee (in 1873) made a report, ostensibly upon the basis of the Wheeling Ordinance, which ascertained, not only that the State of West Virginia did not owe anything on account of the debt, but that the State of Virginia owed the State of West Virginia over \$500,000; and because Virginia would not agree to a settlement upon that basis, West Virginia has refused to negotiate with her. I leave that proposition where the answer of the defendant has placed it.

Now, if your Honors please, it will be my effort, as rapidly and concisely as possible to direct the attention of the Court to the essential issues now presented to it upon this motion for a decree for an account. In the first place, I would ask your Honors to carry in your minds what is the basic principle of our suit, what is the controlling ground upon which the plaintiff, throughout the litigation, through the pleadings and in the argument, has invoked the jurisdiction of this Court. That is, that having failed, after patient and exhaustive efforts to bring about an amicable settlement with West Virginia, Virginia has been constrained, for her own protection, as well as in the discharge of her duty to the common creditors of Virginia and West Virginia, to resort to this Court for relief; and what is the relief that we ask? It is that West Virginia shall be required to account equitably for her just proportion of the common debt. It is an equitable claim that we are asserting here; it is West Virginia's equitable liability which we insist is the measure of her responsibility. I know that it will be the province of this Court to reach a result in this case in

accordance with justice and equity, and that neither technicalities nor quibbles will be allowed to deter it from coming to a conclusion, if it is possible to reach one, which is in accordance with the principles of equity.

It may be that counsel, in the argument of the case, have been in some instances, perhaps, inaccurate in stating the conclusions of law which they have deduced from the facts in the record; but if that be so, the Court will not hold them or their clients bound by an erroneous deduction of that kind.

The distinguished counsel who have spoken for West Virginia have repeatedly said that I, as the law officer of Virginia, have conceded the validity of the Wheeling Ordinance. That is true. I cannot be uncandid with this Court or with the learned counsel. I have said more than once, and I frankly say now, that under the averments of our bill and upon the indisputable facts of the case, I am constrained to the position that the Wheeling Ordinance, viewed from the standpoint of today, was a valid enactment.

Mr. Justice Peckham: Was a valid enactment?

Mr. Anderson: The Wheeling Ordinance was a valid enactment. The Wheeling Ordinance was adopted by a convention, sometimes called a "mass meeting," undoubtedly a revolutionary body, but a body which, though at the time that it sat and enacted this Ordinance, if the issue could have been made up then, must have been held to have been an illegal convention, a body which was, in fact, so far as it could be regarded at that time as a convention of Virginia, a mere fiction. But that body and its acts have been recognized by every department of the Federal Government, directly or indirectly, and it has been recognized by the government of Virginia.

Mr. Justice Harlan: What body?

Mr. Anderson: The Wheeling convention that framed this Ordinance; that convention or its acts have been recognized.

Mr. Justice Harlan: How did the United States ever recognize that mass meeting.

Mr. Anderson: The United States recognized the acts of the Legislature of the restored government of Virginia, which depended for its existence and its organization upon the acts of the Wheeling convention. There could have been no legal legislature of the restored government of Virginia unless there was a legal Wheeling convention to create it. It was a legal fiction, if your Honors please, but by this post-natal recognition, what was a mere

fiction, has become a legal fiction, possessing all the force, if not all the virtue, of a legal verity. But while this is true, I have never committed my mind to the proposition that the Wheeling Ordinance taken by itself, controlled this situation. Disjointed remarks having no reference to this main question precisely, which have been made in the argument of this case, and in the briefs which have been filed, could not be construed into an unqualified admission as to the meaning and effect of the Wheeling Ordinance. Speaking for myself I can say that I have never acknowledged or believed that the Wheeling Ordinance, taken by itself, prescribed the terms upon which the settlement should be made between the two States.

There has been some divergence of views between the distinguished counsel who appeared on behalf of some of the ultimate beneficiaries of any recovery here, and myself, a divergence of views which it seemed to be impossible to reconcile, but the questions propounded by his Honor, Mr. Justice White, on yesterday, which went to the very heart of this case, confirm me in the view that there is no necessary antagonism between the conclusions and results of Major Conrad's main argument as presented yesterday in this case, and the views which I have maintained and which I shall endeavor to present to this Court.

The position taken by Virginia in reference to the Wheeling Ordinance and its effect will be found stated in the complainant's Bill, paragraph 10, (page 6 of Attorney General May's compilation of the record in this case), and in paragraph XVIII of the Bill, (page 11 of Attorney General May's compilation), in both of which the Ordinance is set out and relied upon as one of the grounds of recovery but not the only one; and in paragraph X of the Bill, in which Section 8 of Article 8 of the first West Virginia Constitution, and in paragraphs VIII and IX of the Bill, in which the Acts of the Wheeling Legislature of February 3rd and 4th, 1863, are alleged and relied upon.

The fallacy of the position of my distinguished friends is that they have ascribed to me the concession, which I have never made, that the Wheeling Ordinance prescribes the only ground upon which the settlement can be made. If they had read my opening brief, filed upon this very motion, they would have found their mistake; if they had read the bill in this case carefully, and the opening brief of Major Conrad and myself, filed upon the demurrer, they would have found their mistake; and if they had read my reply brief filed in this case in the last few days, they

would have found they were in error. It is not true, as I view the law and the facts of this case, that the Wheeling Ordinance dominates the situation as to the basis upon which the settlement shall be made, unalterably and irrevocably. As the counsel for plaintiffs have always claimed, the Wheeling Ordinance, section 8 of article 8 of the Constitution of West Virginia, and the act of the Wheeling Legislature of February 3, 1863, must be taken together, must be read together, as prescribing the terms upon which the settlement shall be made.

Mr. Justice Harlan: If they are to be read together, how do you get out of the case the purpose of this settlement, to ascertain the rights of the parties, those words "to be ascertained," and so forth, in the Ordinance?

Mr. Anderson: If your Honor pleases, I think that that question can be answered. The considerations that I was about to present, I think, furnish an answer to it, and a conclusive answer.

I said "read together, taken together." When two acts passed by the same legislative body, or by different legislative bodies having jurisdiction of the same subject, are enacted with reference to that subject, and there is a conflict between them, I would like my learned friend (Mr. Carlisle) to inform me which of those acts would prevail? As legislative enactments they are all valid; none of them could be impeached. But the last is inconsistent with the first, or the first is in conflict with the last. In that condition of things I state it as an elementary, incontrovertible proposition of the law as to the construction of statutes, that the last statute would prevail and supersede the first.

Now, if your Honors please, what was the dominant purpose according to its own expressed language, of the Wheeling Ordinance? The language of that Ordinance is, that the new State shall take upon itself "a just proportion of the debt of the Commonwealth of Virginia existing prior to January 1, 1861." That is the controlling mandate of that enactment. The subsequent and subordinate provisions and details of that enactment must be construed by a court of equity so as to lead to the result which was the purpose of the enactment.

But suppose I am mistaken in that—and I hardly think that I can be—here was this organic law of the Commonwealth of Virginia.

Mr. Justice White: What do you mean by "this organic law of the Commonwealth of Virginia?"

Mr. Anderson: I mean an ordinance of a convention that purported to be a convention of the sovereign people of Virginia.

Mr. Justice White: Oh, yes; I beg your pardon.

Mr. Anderson: It did not have the weight of a constitution; it did not tie the hands of the Legislature of Virginia, whose powers were only limited by the Constitution of the Commonwealth of Virginia at that time, and which, according to the decisions of the Supreme Court of Appeals of Virginia, repeatedly enunciated, was supreme and omnipotent, except where its powers were limited by some express provision of the Federal or State Constitution, or by necessary implication from some express provision of those Constitutions.

And so matters stood in that way on and after the 20th of August, 1861. On the 26th of November, 1861, a convention convened pursuant to that Ordinance, in the City of Wheeling, for the purpose of framing a Constitution for the State of West Virginia. Acting for West Virginia, that convention could undoubtedly when its acts should have been sanctioned, by the vote of the people of the State of West Virginia, with the consent of Virginia, have altered the Wheeling Ordinance. I am indebted to the pertinent inquiries of the Honorable Judge, Mr. Justice White, for the suggestion which confirms this view.

They could alter the Wheeling Ordinance, and they did alter it in a material particular.

Mr. Carlisle: You mean to say that they could do it after West Virginia had accepted the Constitution.

Mr. Anderson: No, I say if they chose to do it in that Constitution, and the people of West Virginia at the polls sanctioned that Constitution, and the Legislature of Virginia sanctioned it and gave their consent that the new State should come into the Union under its provisions, they could have wiped out the Wheeling Ordinance and abrogated it, or they could have amended it, and they did amend it. They constituted the supreme law making power of both States, and to their concurrent act was added the sanction of the Congress of the United States, without which the Constitution, the creation of the new State, and the compact arising from the Constitution and the consent given by Virginia to the admission of the new State to Statehood, would have been nullities, or abortions.

Is there any fallacy in that proposition? Is it possible for human ingenuity successfully to attack it?

If I am right, then the Wheeling Ordinance must be taken and read, as this Court has said it should be, in connection with section 8 of article 8 of the Constitution of West Virginia.

We must apply the Wheeling Ordinance, carry it out if it can be done, without conflicting with the provisions of the subsequent enactment.

If the two enactments can be made to stand together, they must be made to stand together; but if there is an irreconcilable or a substantial conflict between them, the first enactment goes down and the last stands; and so, if, when we come to apply the requirements of the Wheeling Ordinance and carry out the scheme of the Wheeling Ordinance, in stating this debt, it shall be found that any such result is reached as was reached by the Senate committee of the General Assembly of West Virginia, in 1873, the Wheeling Ordinance will have been shown to be in conflict with the essential requirements of the 8th section of the 8th article of the West Virginia Constitution which provides that the State of West Virginia shall assume an equitable proportion of the public debt of the Commonwealth of Virginia existing before the first day of January, 1861.

And so here I am glad to discover that my honored friend, Major Conrad, and myself, come together. We differed as to the validity of the Wheeling Ordinance; we do not differ at all as to its legal effect, if it shall, when applied, lead to an unconscionable or inequitable result.

If it should turn out, upon applying the scheme of the Wheeling Ordinance, that only one-tenth of this debt would be assigned to West Virginia, it would be an inequitable result. There is no man who is familiar with the facts of this case, the history of this debt, the relations of West Virginia to it and of Virginia to it, who must not say that any such result would be inequitable, if not iniquitous. If it should be ascertained that one-fifth of the debt was the proper portion of West Virginia, when you apply the scheme of the Wheeling Ordinance, if that one-fifth bears interest, as the original debt bore interest, I am not prepared to say that it would be an inequitable or an unconscionable settlement, or in conflict with the dominant provisions of the Wheeling Ordinance and of section 8 of article 8 of the Constitution. I am very hopeful that some such result will follow a fair and reasonable application of the provisions of the Wheeling Ordinance, because I am firmly convinced that the makers of West Virginia, in framing that Ordinance, builded fairer than they knew.

Mr. Justice Moody: I do not see how your present position is consistent with the amended proposal that you filed for a decree, and I will just point out my difficulty, and then perhaps you can clear it up, because in the original decree you propose that the master should find what would be the equitable amount and the proportion to be paid. Now you propose to strike out that paragraph and substitute a direction to the master to make a finding which is based exactly on the Wheeling Ordinance. How do you reconcile your present position with that amended paper?

Mr. Anderson: I wish merely to offer that amendment for consideration and adoption by the Court, in the event that they shall adopt the Wheeling Ordinance as a basis of stating this account.

Mr. Justice Moody: Then instead of this being a substitute, you propose this as an alternative?

Mr. Anderson: That is a correct statement of my purpose. The caption of that decree is erroneous. It was an error on my part to which I do not wish to be committed, nor desire my client to be committed. I do not ask that that paragraph of the decree shall be substituted for paragraph II of the original draft, but shall be an alternative or additional direction or paragraph; or if it be treated as a substitute, a substitute only in the event that the Court shall decide that the settlement must be made on the basis of the Wheeling Ordinance and the constating enactments.

If my learned and distinguished friend, (Mr. Carlisle), if he will allow me so to style him, will examine the principal brief of counsel for complainant upon this demurrer in this case, at pages 227, 228 and 229 of May's compilation, and will examine my opening brief upon this motion, at pages 5 and 6, and also at pages 7 and 8, and my reply brief on this motion at pages 16, 17 and 18, he will find that the statements of my position there are entirely in accord with the position which I now occupy, and which I am satisfied, with a clearer vision than I ever saw it before, is the correct position to take in this case.

I will now briefly address myself to the terms of that proposed alternative direction to the master, and the residue of my argument will be largely directed to this view of the case.

As has been repeatedly said by counsel for complainant in this case, as was said by myself upon the argument on the demurrer, the Wheeling Ordinance, upon its face certainly prescribes an arbitrary and an inequitable scheme for the settlement of these ac-

counts. After a somewhat exhaustive investigation of the authorities and of the history of this question, I have been unable to find any precedent or authority anywhere that sanctions any such scheme of settlement for ascertaining the liability of two Commonwealths which have been formed out of one original Commonwealth. In the appendix to the reply brief for the complainant I have quoted a large number of those authorities and there are others that I have examined. Not one of them sanctions any such principle as is embodied in the Wheeling Ordinance as a basis of settlement. So that I feel justified in saying that the requirements of that Ordinance are in conflict with the common law of the civilized world, and contrary to all the precedents established by the nations of the earth in dealing with this subject. I say also, without any likelihood of contradiction, that upon its face it is contrary to common right.

As counsel have already shown in the case, more ably than I could possibly do, there is no principle of justice or equity which is satisfied by the terms of the Wheeling Ordinance. If this be true, it goes without further argument that that Ordinance must be strictly construed, so as if possible to give it an equitable effect; that it must be construed liberally as to Virginia, who was not, as a matter of fact, its enactor; that it must be construed strictly against West Virginia, who was to be the beneficiary under it.

Not for that reason only must it be so construed, but because it is contrary to common law and to common right.

I need not cite many of the numerous authorities for that proposition. I will, however, call attention to *Brown vs. Berry*, 3rd Dallas; *Shaw vs. Railroad Company*, 101 U. S., 557; *New York vs. Wheeler*, 48 N. Y., and a large number of other cases cited by Mr. Enlich, at section 127, and referred to in my brief, sustaining this rule.

But we have more conclusive authority than those adjudications. We have repeated decisions of the Supreme Court of Virginia before the formation of West Virginia, and which constituted a part of the body of the laws of West Virginia, and decisions also of the Supreme Court of Appeals of West Virginia to the effect that where a law is contrary to common law, and particularly where a law is contrary to common right, it will be strictly construed so as if possible to give it an effect which will not operate an injustice and a wrong. Those cases are cited on page 14 of my reply brief.

What I claim is that, conceding, for the purpose of argument, that the Wheeling Ordinance can stand, notwithstanding its conflict with section 8 of article 8 of the Constitution of West Virginia, that the principle which a court of chancery and a court of conscience will adopt in administering such an Ordinance, is that the enactment will be interpreted and applied so as not to defeat the dominant equitable purpose declared upon its face, *ut res majus valeat quam pereat*.

Mr. Justice Holmes: Suppose I should be of opinion, as you and Mr. Conrad both seem to be, that the Wheeling Ordinance was a swindle in its inception and was gotten up in fraud of the rights of Virginia, and that among other things it put in a provision that was intended to bear down hard upon Virginia, but I now find myself in the position that I am bound to carry out that Ordinance, am I, because of the principles of equity or anything of that sort, to give the words any meaning other than that which I honestly believe they bear? Am I not to construe it as those who intended to put the screws upon you meant to have the thing come out?

Mr. Anderson: No, if your Honor pleases, in that case all I claim is you would have, in construing it and applying it, to give Virginia the benefit of any reasonable doubt; that is what we ask.

But in that connection, and in farther response to the suggestion of his Honor, Judge Holmes, I think it perhaps proper to emphasize more than I have done the position that I have taken, and which seems to me to be unanswerable, that if this Ordinance does not result, if you apply the scheme which it prescribes, in assigning to West Virginia an equitable proportion of this debt, that then the settlement must be made under section 8 of article 8 of the Constitution, so as to satisfy the paramount requirements of that section. My friends admit that that is a compact in one part of their brief, for one purpose, but deny that it is a compact for another purpose. They are guilty of the same inconsistency, if I understand their position, which they inaccurately ascribe to us.

On page 10 of their brief, at the bottom of the page, after quoting Mr. Justice Field on the subject of the proper apportionment of a debt between two sovereignties formed out of one divided Commonwealth, it is said:

"It is apparent that Mr. Justice Field, in the clause last above quoted, referred to the special agreement."

What special agreement? The agreement which is stated in their brief as being, "evidenced by section 9 of the Ordinance and the first clause of section 8 of Article VIII, of the West Virginia Constitution."

If those two enactments constituted a compact or a special agreement for one purpose, I would like to know by what process of reasoning they would not operate to create a contractual relation for all purposes. And I would like still more particularly to know, how they can show that, if that concurrent action would constitute a contract, the fact that the Legislature of Virginia gave its consent by the act of May 13, 1862, to the formation of the State of West Virginia under the provisions of that first West Virginia Constitution, did not constitute a compact.

That transaction is defined still farther as a special agreement on page 11 of their brief; and my distinguished friends say on page 8 of their brief, and I agree with them in the proposition, that where a State has once committed itself to an agreement of this kind, particularly where it has received the approval and consent of Congress, as this compact has, it cannot withdraw from it afterwards by repealing the Constitution, or the enactment by which that contract was created.

Now, I pass on rapidly to discuss other important questions, the first of which will arise and have to be decided by this Court no matter which basis of settlement is adopted, whether we are constrained to make this settlement under the Wheeling Ordinance, or under the Wheeling Ordinance and the constating enactments; or to make it under section 8 of article 8 of the Constitution.

That question is—and it is one of the most important this Court will have to adjudicate in this cause—whether West Virginia is bound to pay interest, and if so, from what time, and until what time she will be required, as a matter of equity and justice, to pay interest? This interest question is necessarily an exceedingly important one, because where a debtor has been in default and refused to carry out and perform his obligations for forty years, the interest necessarily amounts to a great deal more than the principal. It is, therefore, a most important question in this case. And in this connection, without dilating upon it at all, because my colleague has already discussed it fully and cited the authorities which are given in our reply brief, we must remember that this was a Virginia contract, and that the rule in Virginia in regard to the liability of a debtor to pay interest is different from

the common law rule, and different from the rule prevailing in North Carolina. In North Carolina, I understand the rule to be, as was stated by this Court in *U. S. vs. North Carolina*, 136 U. S., 211, that interest was allowed in that State, as it was at common law, as damages for the detention of money. In Virginia it is allowed as an inherent and essential incident of the contract, and as due upon the principles of natural justice and equity. That principle has been repeatedly enunciated in Virginia as shown by the authorities cited in our reply brief, and there is nowhere any contrary ruling.

Mr. Justice White: Whether that be true or not true, how does that question arise? That is a mere computation of interest. The matter that will go to the master is an examination into the facts. The matter of the interest is a mere arithmetical calculation if the amount should be found to be due, and what is the necessity of us now considering the matter of interest at all?

Mr. Anderson: It is necessary to find out how much is due at any given time.

Mr. Justice White: The question of calculating the interest, how much is due, is a mere arithmetical calculation, and it does not take any great service of the master to do that. Anybody can calculate that.

Mr. Anderson: That can be done when the amount is ascertained, but the question has been raised, and it is important that it shall be decided.

Mr. Justice White: That is raised because you asked a decree concerning the interest. What I am asking you is, what in the world has the question as to when the interest shall begin to run on an amount to be found due to do with the question of sending this to a master? That is a matter that can be calculated by a school boy, if the principal is fixed and the rate of interest is fixed.

Mr. Anderson: That is true, if your Honor pleases, but our friends on the other side deny that any interest is due, and we want the principle settled.

Mr. Justice McKenna: If you claimed it as damages, you would not be entitled to it as damages until the decree was passed.

Mr. Anderson: We claim interest here as a part of the contract. We claim, first, that it is an inherent incident, and is essential incident, to any contract under the laws of Virginia, under

which interest is due not as damages for the detention of money, but as an obligation of justice and good conscience.

Mr. Justice Holmes: Are you sure this contract is a Virginia contract, a contract by Virginia with another State?

Mr. Anderson: I think it is a Virginia contract. At the time this contract was written, the new State had not been created. It became a contract with the creation of the new State.

Mr. Justice Holmes: Was that not merely an offer?

Mr. Anderson: If your Honors please, the law of West Virginia is identical with the law of Virginia on that subject, as settled by the cases which I have cited in the reply brief.

Mr. Justice White: You submit a lot of propositions here about what the master should do, what he should find, which involves some matter, of course, of serious consideration. In order to arrive at the proper amount due, your master has nothing to do with what interest it shall bear or when it shall bear interest. That is a mere matter that can be fixed.

Mr. Anderson: I will not follow that question further. My colleague has argued it fully, and it is very fully discussed in the brief. If the Court does not decide the question now, it will be reserved for future consideration and future argument; but I had hoped it would be decided now.

Mr. Chief Justice Fuller: The question is whether if we do not decide it now, we shall be privileged to listen to another argument on the question of interest, so can it not be decided now?

Mr. Anderson: I cannot conceive, if your Honor pleases, any facts that can ever be put into this record that can throw any light on that question that are not in the record now. It can be decided now as well as it can ever be decided.

Mr. Chief Justice Fuller: I do not insist upon it.

Mr. Justice Holmes: I do not wish to have it assumed that I may not be prepared to deal with that question, as well as others, at the present moment; I have not made up my mind.

Mr. Anderson: I will only say that under its language the Wheeling Ordinance requires West Virginia, the new State, to take upon itself, what? A particular sum of money, as the distinguished counsel (Mr. Spooner) has argued, a lump sum of money, as he argues? No, but to take upon itself a proposition, "a just proportion," of the debt of the Commonwealth of Virginia.

Mr. Justice Harlan: As of what date?

Mr. Anderson: As of the 31st of December, 1860.

Mr. Justice Harlan: Then you ask your interest from that date?

Mr. Anderson: From that date.

Mr. Justice Harlan: That is in effect, then, saying that the debt of that State includes that interest?

Mr. Anderson: Includes that interest. It certainly includes interest from the time the stipulation went into effect, and I think it should be construed to relate back to the arbitrary date fixed by both Virginia and West Virginia as of which this settlement should be made. To do justice they must do that; but if interest is to be charged only from the date when West Virginia became a State, June 20, 1863, that would be to leave out the interest for only about two years. But by both the Ordinance and the first West Virginia Constitution, January 1, 1861, was fixed as the date as of which the settlement was to be made. Section 8 of article 8 of the West Virginia Constitution did not require the new State to pay any cash sum to Virginia, and the learned counsel (Mr. Spooner) is mistaken in his quotation and in his interpretation of that section. It required the new State to assume an equitable proportion of that debt. He says there is no reference to the debt; there is a reference to the debt, but no reference to any sum of money. The only reference is to the debt, and the only assumption which the new State was required to take upon its shoulders was a proportion of the debt of the old State; and that debt was an interest bearing debt. That section of the Constitution made it the duty of the government of West Virginia to provide for the payment of the accruing interest and to provide for the payment of the principal within thirty-four years, with this significant circumstance, which I will take only a moment to mention, that it was provided in that section that the new State should create a sinking fund which would do this thing. The terms in which that sinking fund is defined are identical with those prescribed in the then Constitution of Virginia in reference to the creation of a sinking fund which that Constitution required should be created for the purpose of extinguishing the debt of the Commonwealth. That sinking fund provided for the accruing interest and the payment of the principal within thirty-four years.

Mr. Carlisle: There is no controversy between us about the interest after the debt is ascertained.

Mr. Anderson: Now, if your Honors please, there is another

important point, to which I have deemed it my duty to invite the attention of the Court, and which will have to be decided now, which cannot be postponed, and it seems to me that there is enough in the record to enable the Court to decide now, and that is, if this account is taken under the Wheeling Ordinance, there must also be included in the debit charges against West Virginia, the value of all property which that State has received under the act of February 3, 1863. Our friends on the other side say that West Virginia is not bound by that act, because the consent of Virginia had already been given to her creation into a State.

Mr. Justice Holmes: They also say they did not receive anything under it.

Mr. Anderson: That is a question of fact, if your Honor please. We will be prepared to show they received a great deal. They admit that they received some bank stock.

Mr. Justice Holmes: I should like to call your attention in that connection, because I do not think it is mentioned, to a portion of article 9 of the Wheeling Ordinance:

“No grants of lands or land warrants, issued by the proposed State, shall interfere with any warrant issued from the land office of Virginia prior to the 17th day of April last.”

This language seems to assume on the face of it that all the public land that is in the proposed new State will fall to the new State and be the subject of land warrants from the moment that the new State comes into existence.

Mr. Anderson: No sir, I think not; I hardly think that is a necessary inference, particularly as there is this provision in the same Ordinance, section 11:

“The government of the State of Virginia, as reorganized by this convention at its session in June last, shall retain, within the territory of the proposed State, undiminished and unimpaired, all the powers and authority with which it has been vested, until the proposed State shall be admitted into the Union by the Congress of the United States, and nothing in this Ordinance contained, or which shall be done in pursuance thereof, shall impair or affect the authority of the reorganized State government in any county, which shall not be included within the proposed State.”

In other words, the State reserved its plenary authority and power over all the property and the people within the proposed

State of West Virginia until the new State should be actually admitted into the Union, and under that reservation, if it had been necessary to make any such reservation, it was competent for the Legislature of Virginia to pass this Act of February 3d, 1863. If your Honors please, besides the other sanctions mentioned in the reply brief for Virginia, this Act has additional and conclusive sanction; it has been accepted by the Legislature of West Virginia. The property has been accepted under this Act, and the Act has been recognized by West Virginia. The Act of February 3d, 1863, turned over a great variety of properties to the new State, all taxes due to the old Commonwealth of Virginia, running back to 1831, or to a very remote period—I believe taxes prior to 1831 had been then released; all the delinquent lands were transferred to the new State; all recognizances and judgments; and all property, of whatever character, belonging to Virginia, which had its situs in the new State, was transferred by the Act to the new State. Now, on the 26th day of February, 1864, at one of the first sessions of the Legislature of West Virginia after the creation of the new State, the Act was passed, a copy of which has been filed in the record, and it goes on to prescribe the mode in which, and the officers by whom, these claims which have been transferred to the State of West Virginia by the State of Virginia shall be collected by the government of West Virginia. That was undoubtedly a recognition of this Act by the government of West Virginia and the acceptance of its provisions, which bind West Virginia.

Mr. Justice White: Did that Act contain a provision that West Virginia should pay for that property?

Mr. Anderson: The Act of February 3d, which transferred all of this property, provided that West Virginia should pay for it, "should duly account for the same in the settlement to be hereafter made" with Virginia,—and there was no settlement to be made except the settlement of the debt.

Mr. Justice Holmes: Look at that very Act. The language is: "has become the property or has been transferred;" so I should say that very phrase left it open.

Mr. Anderson: If your Honor please, here is a clear and a positive sanction by West Virginia of that grant. There has been no property transferred to West Virginia except that transferred by that Act of February 3d, 1863. West Virginia's acceptance of a portion of the property granted thereby, was an acceptance of the whole Act.

A great deal of that property would, under no principle of public law, have gone to West Virginia. It is that property, as well as property that, under principles of public law, where there has been no convention between the two States, no treaty or agreement on the subject, which was transferred to, and accepted by, West Virginia under the provisions of that Act.

I now refer to another and an express sanction by West Virginia of the Act of February 3d, 1863. It is the statute found on page 41 of my reply brief. It is the 8th section of the Act approved December 20th, 1875, Acts of the Legislature of West Virginia, session of 1875, page 126, which is as follows:

"The Auditor shall institute all the necessary and appropriate measures for the collection of all claims for taxes and other demands transferred by the Commonwealth of Virginia to this State by an act of the General Assembly of said Commonwealth entitled 'an act transferring to the proposed State of West Virginia, when the same shall become one of the United States, all the State's interest in property, unpaid and uncollected taxes, fines, forfeitures, penalties and judgments in counties embraced within the boundaries of the proposed State aforesaid;' passed on the third day of February, 1863."

There is here a direct reference to, and acceptance of, the provisions of the Act of February 3d, 1863, which commits West Virginia irrevocably to the terms of that Act.

But, referring to the inquiry made by His Honor, Mr. Justice Holmes, I wish to say farther that under the Wheeling Ordinance West Virginia would not take any of this property, not even such of it as she would take according to the authorities on international and public law, if there had been no agreement between the two States. Here there was an elaborate and minute specification of all the rights of the new State, and no disposition is made of the property the title to which was in the Commonwealth when that Ordinance was passed in August, 1861, and which remained in the Commonwealth after its enactment. The title to that property could not be taken out of the Commonwealth without adding a new term to that Ordinance and to any contract or compact which could be implied from it; and no new term could be added to it without the consent of Virginia. The men who framed that Ordinance recognized that proposition of law to be true. The same men were, to a large extent, members of the Legislature of 1863, which passed the Act which transferred to the new State, when it should be admitted into the Union, all the property within the

limits of West Virginia, the title and ownership of which had been vested in the Commonwealth anterior to the admission of West Virginia, and other property therein mentioned, but upon the terms that the new State should account for it in the settlement to be made between the States.

And so I say the parties themselves have made an agreement upon terms different from those which would have resulted if there had been no convention or treaty or compact between them.

There is only one other matter to which I deem it proper to ask your Honors' attention in this connection, and that is to the principles upon which an apportionment shall be made of the ordinary expenses of the State government. Of course, we cannot determine in advance what you will regard as ordinary expenses. It will be difficult to define them. I suppose they will include all the regular payments, whether annual or otherwise, all the regular and ordinary disbursements of the Government,—

Mr. Carlisle: To conduct the Government.

Mr. Anderson: Or to meet its obligations.

Mr. Carlisle: Oh, no.

Mr. Anderson: Interest on its debt. One of the most regular and ordinary expenses of the Government of Virginia was interest on its debt, and unless that shall be included as an item, great injustice will be done to the Commonwealth, and it will be impossible that there should be any equitable result without it.

But how shall these ordinary expenditures be apportioned? That is a matter which can be passed upon, perhaps, intelligently and satisfactorily by the Court from the data already in the case, or from the facts that are conceded by counsel.

The learned counsel for the defendant say it ought to be apportioned on the basis of aggregate population. Why should the slaves be included? They constituted no part of the body politic; they had nothing to do with the making of the debt; the debt was made exclusively by the white population. The slaves owed no part of the debt. Indeed, they were taxed as property, all of the slaves, except those under twelve years of age, who were regarded as being a burden rather than an advantage to their masters.

Mr. Carlisle: That is, the masters were taxed.

Mr. Anderson: The masters were taxed as upon other property. They were property. They were not persons under the then law, not citizens under the laws of the United States and of Virginia.

The debt was made exclusively by the white population and for its benefit; and the citizenship of the State, the white population, were alone looked to for the payment of the debt. Under these circumstances it seems to me to be just and equitable that the proportion should be upon the basis of the aggregate population after deducting slaves; not only for the reason just cited, but because the slaves added very little to the cost of administering the government. They were policed by their masters upon their plantations. They were regulated by their masters. The records of crime will show that the percentage of crimes among them was insignificant as compared to what it has been among the free population of the country after the negroes were emancipated.

So, upon all these considerations, it will be just and right that the proportion should be made upon the basis of the white population, or, if there is a doubt about that, the benefit of the doubt should be given to Virginia.

I find that I have exceeded the time which the Court has been kind enough to allow me. I beg leave to say one thing more, and that in response to statements made in the argument of the learned counsel for West Virginia. This suit was brought against West Virginia in no spirit of revenge. It was brought in sorrow rather than anger, and not with any desire or purpose of injuring or punishing West Virginia. We do not want West Virginia to be "punished" for anything she has done; neither do we wish the Commonwealth of Virginia or the common creditors to be punished; but what we desire is that this case shall be decided and that the proportion of this debt to be borne by the new State shall be ascertained upon the same principles of justice and equity, which would apply to the apportionment of a common debt between joint owners of property who, under similar circumstances and similar covenants, had divided their patrimony between them.



Supreme Court of the United States.

OCTOBER TERM, 1907.

Decree Referring the Cause to a Master.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

In Equity.—Original, No. 4.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

DECREE REFERRING THE CAUSE TO A MASTER.

This cause coming on this day to be heard upon the complainant's bill and the exhibits filed therewith, the answer of the defendant, with the exhibits filed therewith, and the general replication filed by the complainant thereto, was argued by counsel. On consideration whereof it is adjudged, ordered, and decreed that this cause be referred to _____, who is hereby appointed a special master herein, who, after giving not less than ten days' notice to the parties of the times and places fixed by him, from time to time, for executing this decree, will without delay ascertain and report to the court:

I.

The amount of the public debt of the Commonwealth of Virginia as of the first day of January, 1861, stating specifically, how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness.

II.

What amount and proportion of said indebtedness and of the interest accrued thereon should in equity be apportioned to and be now paid by the State of West Virginia.

III.

He will make and return with his report any special or alternative statements of the accounts between the complainant and the defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the court.

It is further adjudged, ordered, and decreed as follows:

(1) To the end that full and complete information may be afforded the master as to all matters involved in the inquiries with which he is charged by this decree, the Commonwealth of Virginia and the State of West Virginia shall each of them respectively produce before the master, or give him access to, all such records, books, papers, and public documents as may be in their possession or under their control and which may, in his judgment, be pertinent to the said inquiries and accounts or any of them.

And the master is authorized to visit the capitals of Virginia and West Virginia, and to make or cause to be made such examinations as he may deem desirable of the books of account, documents, and public records of either State relating to the inquiries he is directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All published records published by authority of the Commonwealth of Virginia prior to the creation of the State of West Virginia and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the partition of her territory which, in the judgment of the master, may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master. The public acts and records of the two States since the creation of the State of West Virginia shall be evidence if pertinent and duly authenticated; but all such testimony tendered by either party shall be subject to proper legal exception as to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

(2) The master is authorized and empowered to employ such accountants, stenographers, or other clerical assistance as he may find it desirable to employ, and to secure such rooms or offices as he may require, in order to the prompt and efficient execution of

this order of reference, and to agree with such accountants and stenographers, typewriters, and the owner of such room or rooms for such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

(3) The complainant will cause the sum of three thousand dollars to be deposited with the marshal of this court to the credit of this cause, on account of the costs and expenses of executing this decree and of this suit, and the complainant will cause such farther sums as may be necessary to defray the costs and expenses of executing this decree to be from time to time in like manner deposited with said marshal. In the event that the defendant shall desire any special statement or accounts to be made, she shall in like manner, before the taking of any such account or the making of such special statement, cause the sum of _____ dollars to be deposited with the marshal.

And the master is authorized from time to time to draw upon the funds so deposited by Virginia for the compensation of the accountants and other clerical assistants whom he may employ, and for any other costs or expenses, including stationery, printing, and room rent, which it may in his judgment be necessary to be incurred in promptly and efficiently executing this order of reference or making up any special statement or accounts asked for by the plaintiff, and the same will be charged up as part of the complainant's costs; and he will draw upon the fund deposited by the defendant for any costs which may be incurred in making up any special statement or accounts which may be desired by the defendant to be specially stated, which drafts, accompanied by proper vouchers, the marshal of this court will pay, and the same will be charged up as part of the defendant's costs in the cause.

And the said marshal is allowed to have and retain a commission of five per centum for his services in receiving and disbursing the funds so deposited with him, and he will make a report of his transactions, receipts, and disbursements in the premises to the court.

IV.

The first notice of the time and place fixed by the master for beginning the taking of the accounts directed by this decree shall be given at least thirty days before the date fixed by him there-

for, provided that the date so fixed by the master for beginning the taking of said accounts shall not be a day earlier than February 20, 1907. The master may adjourn his sittings from time to time and place to place without notice to the parties. He will cause to be kept, in a minute book to be provided for the purpose, a journal or minutes of his sittings in the execution of this decree, showing the counsel present, if any, any adjournments which may be taken by him from time to time or place to place, and any other matters which the master may deem it proper to mention therein, which minute book or journal he will return with his report.

V.

Any notices to be given in connection with the execution of this decree may be given to the Attorneys-General of the respective States.

. RICHMOND, VIRGINIA, *December 7, 1907.*

To Hon. CLARKE W. MAY,

Attorney-General of West Virginia:

Please take notice that on the meeting of the court on Tuesday, the seventeenth instant, we will move the Supreme Court of the United States to enter in the above-entitled cause the decree of which the above is a copy.

WILLIAM A. ANDERSON,

HOLMES CONRAD,

Counsel for the Complainant.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Motion to Modify Decree of Reference.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

IN EQUITY.—ORIGINAL, NO. 4.

COMMONWEALTH OF VIRGINIA, *Complainant,*
against

WEST VIRGINIA, *Defendant.*

MOTION TO MODIFY DECREE OF REFERENCE.

To the Honorable the Supreme Court of the United States:

Now comes the State of West Virginia, the defendant herein, and availing itself of the leave granted by the interlocutory decree heretofore entered in this cause, respectfully moves the court to modify the said decree to the end that the same may be more definite and certain in the particulars hereinafter set forth:

First. By amending paragraph two to read as follows:

“The territorial area and assessed valuation of the States of Virginia and West Virginia June 20, 1863, and the population thereof, with and without slaves, separately stated, including in the latter State the counties of Berkeley and Jefferson.”

Second. By adding at the end of paragraph three thereof the words:

“Prior to January 1, 1861.”

Third. By amending paragraph four so as to read as follows:

“The ordinary expenses of the government of Virginia since any of said debt was contracted and prior to January 1, 1861, on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States.”

Fourth. By amending paragraph five by striking out the words "fair estimated" where they occur in the first line, and inserting in lieu thereof the word "assessed" and by adding at the end thereof the words "during the same period," so that the same will read:

"5. And also on the basis of the assessed valuation of the property, real and personal, by counties, of the State of Virginia during the same period."

Fifth. By amending paragraph six by inserting before the word "period" in the second line thereof the word "said" and before the word "prior" in the third line thereof the word "and," and by striking out the words "the admission of the latter State into the Union" and inserting in lieu thereof the words "January 1, 1861," so that it will read:

"6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the said period and prior to January 1, 1861."

CLARKE W. MAY,
Attorney General.

J. G. CARLISLE,
JOHN C. SPOONER,
CHAS. E. HOGG,
W. MOLLOHAN,
GEO. W. MCCLINTIC,
W. G. MATHEWS,

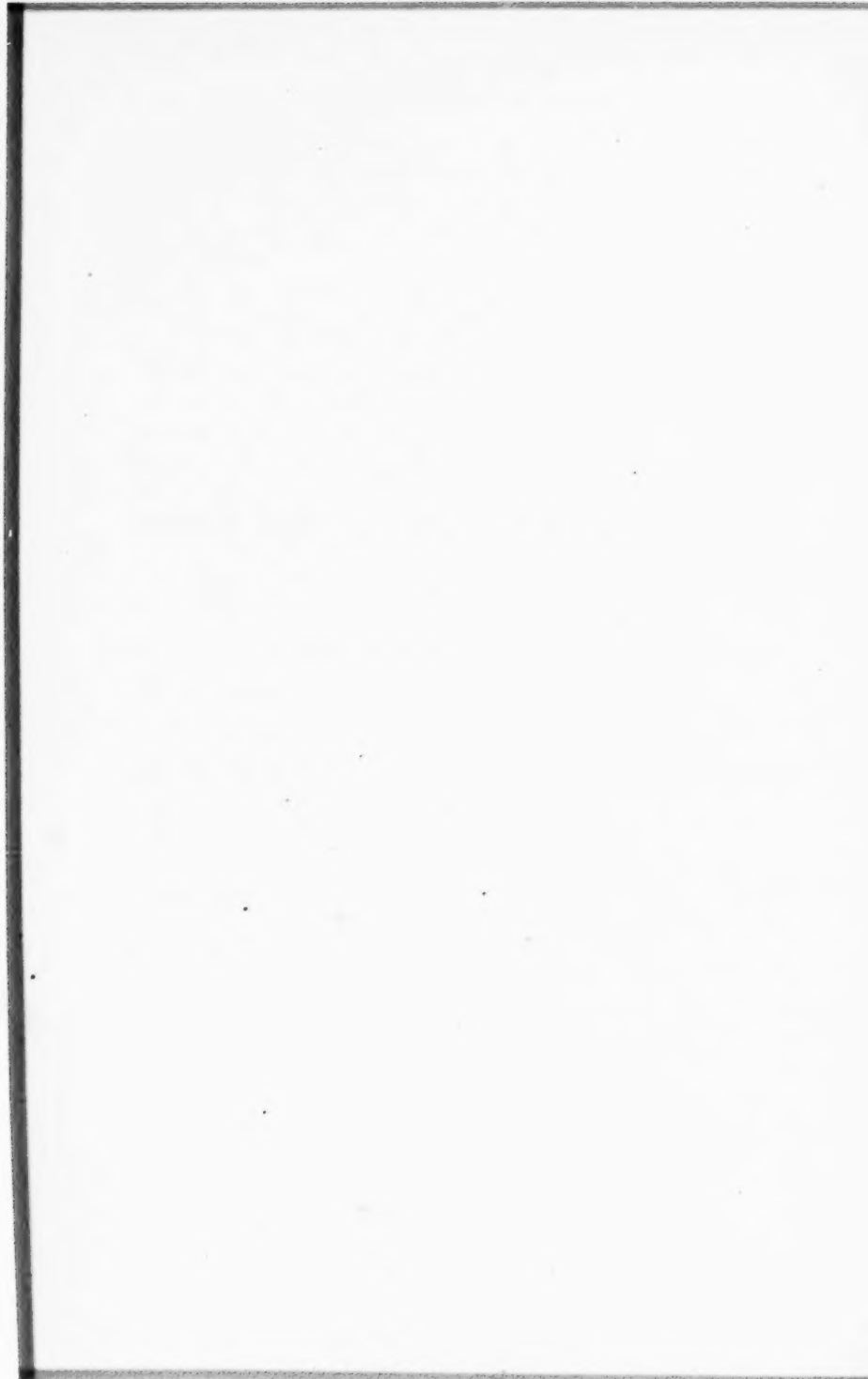
Of Counsel for Defendant.

[Endorsed:] Supreme Court of the United States. October term, 1907. In equity. Original No. 4. Commonwealth of Virginia, complainant, against West Virginia, defendant. Motion to modify interlocutory decree referring cause to master.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Brief of Defendant in Support of Motion to Modify
Decree of Reference.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

IN EQUITY. ORIGINAL, No. 4.

COMMONWEALTH OF VIRGINIA,

vs.

WEST VIRGINIA.

BRIEF OF DEFENDANT IN SUPPORT OF MOTION TO MODIFY DECREE OF
REFERENCE.

Paragraph 2 of the decree of reference entered herein on the 4th day of May, 1908, directed the special master to ascertain—

“2. The extent and value of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof, with and without slaves, separately.”

As a substitute for this the defendant proposes the following:

“2. The territorial area and assessed valuation of the States of Virginia and West Virginia June 20, 1863, and the population thereof, with and without slaves, separately stated, including in the latter State the counties of Berkeley and Jefferson.”

We respectfully submit that unless the official assessments of the territory and slaves in both sections of the State are made the basis of the valuation of the master, it will be impossible for him to comply with this part of the decree in a manner satisfactory to the court or the parties. Forty-five years have elapsed since the date fixed in the decree for the valuations, and it is scarcely possible that witnesses can now be produced whose testimony upon the subject will be conclusive or satisfactory. Moreover, the introduction of parol

evidence to prove values as they existed forty-five years ago, in a State consisting of more than 60,000 square miles of territory and containing many thousands of slaves, would necessarily prolong the investigation to an unreasonable extent and subject the litigants to a very large and, we think, useless expense. At best, the witnesses could only state their opinions, and upon such a subject they would differ so widely that it would not be possible to reconcile them so as to reach a satisfactory conclusion. The decree provides:

"All public records published by authority of the Commonwealth of Virginia prior to the 17th day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid, which in the judgment of the master may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two States since the admission of West Virginia into the Union shall be evidence, if pertinent and duly authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency."

The authentic official evidence thus provided for in the decree would seem to be sufficient to secure a reasonable degree of accuracy in the valuations ordered to be ascertained by the master without encumbering the record and protracting the investigation by the introduction of unreliable opinions, which must, under the circumstances, be mere guesses.

The assessments are parts of the public records of the State and constituted the basis of taxation in both sections, and their accuracy ought not be impeached at this late day by the mere opinions of witnesses based upon their recollections of the situation as it then existed. These opinions as to the value of the territory of West Virginia would be largely influenced by the developments of her mineral and other resources and the internal improvements made in that State since 1863, and the testimony would be quite different from what it would have been if it had been taken at that time. It was then known, as is alleged in the bill, and was known when Virginia began to create the debt, that these resources existed, and it is to be presumed that the officials in assessing the value of the land took them into consideration. Most of the land was not arable and was valuable mainly, if not entirely, because of the forests and minerals. It would be manifestly unfair to West Virginia to receive as evidence, for the purpose of increasing the valuations, the mere opinions of

witnesses as to the values of gas, coal, iron, and timber separately from the land in which the minerals were deposited or on which the timber was grown, and then add that value to the assessment which already included them. It is stated in the brief filed for Virginia on this motion that these minerals and other resources were not included in the assessments "as distinct subjects of valuation;" but it is said "their presence was considered in estimating the value of land in transactions between vendor and vendee," and that the property was assessed at two-thirds its value. That would be, we suppose, at two-thirds of its market value, including, of course, the minerals and other resources. The same rule of assessment prevailed in both sections of the State, and therefore the relative proportions which the value of property in one section bore to the value in the other would be precisely the same as if it had been assessed at its full market value.

If the assessments are not to govern, what is to be the test value? It would be impracticable to prove the market value of the land and slaves in 1863, but if assessed values are to be ignored or contradicted, we know of no other test except market value that could be properly applied.

For two years prior to June, 1863, a large part of the territory which now constitutes the State of Virginia was occupied by the two armies, and not only was much valuable property destroyed or carried away, but all values, and especially the values of slave property, were greatly depreciated. The people of West Virginia were not responsible for this condition and they ought not to be prejudiced by it in ascertaining the relative values of the property in the two States at that date.

Paragraphs 3, 4, 5, and 6 read as follows:

"3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted.

"4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of Virginia with and without slaves, as shown by the census of the United States.

"5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia.

"6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West

Virginia during the period prior to the admission of the latter State into the Union."

The defendant asks that these paragraphs be so modified as to read as follows:

"3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of said debt was contracted, *and prior to January 1, 1861.*

"4. The ordinary expenses of the government of Virginia since any of said debt was contracted *and prior to January 1, 1861*, on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States.

"5. And also on the basis of the *assessed* valuation of the property, real and personal, by counties, of the State of Virginia during the same period.

"6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia, during the said period, *and prior to January 1, 1861.*"

Unless some date is fixed by the court at which the investigation shall stop, the master will be required to decide what seems to us some very difficult questions. On the 17th of April, 1861; Virginia passed an ordinance of secession from the Union, and from that time on until long after West Virginia was admitted as a State the two sections were substantially as separate and distinct as they are now. Not long after the passage of the ordinance of secession the restored government of Virginia was organized, composed almost entirely of the counties now constituting the State of West Virginia. These counties paid nearly the whole of the revenue of the restored State until the admission of the new State into the Union. Is West Virginia to be charged in this proceeding with money expended in what is now her territory during that time, and with her just proportion of the ordinary expenses of the government up to June 30, 1863? That was the only recognized government existing in Virginia during that period. We do not suppose it will be claimed that West Virginia is liable for any part of the ordinary expenses of the government at Richmond after the passage of the secession ordinance. To make such a charge against her would be to compel her to contribute to the support of a government in rebellion against the United States. Under the Wheeling ordinance she ought to be charged with money expended in her counties and with her share of the ordinary expenses and credited with money paid into the State treasury during *the same period*, whatever that period may be; and it should be prescribed by the court, not left to the master.

Most of what we have said concerning paragraph 2 of the decree is also applicable to paragraph 5. It does not appear to us at all practicable to ascertain, by the testimony of witnesses, what was "the fair estimated valuation of the property, real and personal, by counties" forty-five years ago. According to the position taken by counsel for Virginia, the valuation is to be ascertained by considering the oil, gas, iron, coal, and timber separately from the land in or on which they were situated, and then, of course, it would be necessary to ascertain the value of the land separately, without the minerals or timber, in order to secure the entire valuation. This tedious process would have to be adopted in both States, if it was adopted in one, and the investigation would consequently be almost interminable. It is well known that Virginia had vast and valuable deposits of coal and iron and large forests of timber, as well as many other natural resources and advantages which West Virginia did not possess, such as navigable waters, access to tide water, with large bays and fine harbors. Are all these assets to be valued separately also, or did they, like the minerals and timber in West Virginia, affect the value of land and other property of the State and thereby increase the valuation in the official assessments?

The fact that assessments were not made annually, but only once in ten years, is not very material when they are introduced as evidence of values in any intermediate year. The United States census is taken only at the end of each decade, but each decennial census and each decennial assessment shows a certain rate of increase or decrease, as the case may be, since the last one was taken, and it is not difficult, therefore, to calculate with reasonable accuracy what the values are in any particular year. Such evidence is certainly far more reliable than the memories and opinions of witnesses who are called to testify after the lapse of nearly half a century.

In plaintiff's brief on this motion it is said:

"The expenses of the government of the restored State government from June or July, 1861, to June 20, 1863, when the State of West Virginia was created, were all furnished from the funds of the Commonwealth of Virginia, as appears from the acts of the legislature referred to in the progress of this cause. So that the latter date would be the proper one, if any amendment at all is to be made."

On the 19th day of June, 1861, the convention which had assembled at Wheeling on the 8th of June, 1861, adopted an ordinance for the reorganization of the State government, and the restored State government was organized immediately thereafter by the election

(by the convention) of a governor and other State officials. Senators were elected to the Congress of the United States on the 9th day of July, 1861, and they were admitted to seats in the Senate on the 13th day of the same month. This government continued until 1867, and it defrayed all its own expenses as long as it existed. As already stated, nearly the whole of its revenue was paid by the counties now composing the State of West Virginia until the admission of that State into the Union; the old Commonwealth of Virginia paid no part of the expenses. It had not only withdrawn protection from the persons and property of the people in West Virginia, but was waging war against them, having, as early as April 24, 1861, seven days after the passage of the ordinance of secession, entered into an agreement with the Confederate States transferring the control of the State to the Confederacy. We are not aware of the existence of any acts of the legislature showing that any part of the expenses of the restored State government was paid "from the funds of the Commonwealth of Virginia," unless the restored government is meant; and if this is the meaning of the statement, the people of West Virginia have paid once for the support of their government and for the protection of their territory and property, without any assistance from the old State, and that State ought not now to have any credit on account of these ordinary expenses.

We respectfully submit that, whatever date may be fixed with respect to the closing of the other accounts in controversy, it is clear that West Virginia should not be charged with any part of the ordinary expenses of the State government after the actual separation and the withdrawal of protection by Virginia in this respect.

WM. G. CONLEY,

Attorney General.

J. G. CARLISLE,

JOHN C. SPOONER,

CHAS. E. HOGG,

W. MOLLOHAN,

GEO. W. MCCLINTIC,

W. G. MATHEWS,

Of Counsel for Defendant.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Brief of Plaintiff Against Motion of Defendant to
Modify the Order of Reference.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

IN EQUITY.—ORIGINAL, NO. 4.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*

BRIEF OF PLAINTIFF AGAINST MOTION OF DEFENDANT TO MODIFY
THE ORDER OF REFERENCE.

The complainant, by her counsel, respectfully objects to the modifications proposed by the defendant to the order of reference, and for grounds of objection indicates the following, *viz*:

(1) The order of reference directs the master to ascertain and report:

“2. The extent and value of the territory of Virginia and of West Virginia June 20, 1863,” etc.

The proposed modification of this section is as follows, *viz*:

“The territorial area and *assessed* valuation of the States of Virginia and West Virginia June 20, 1863.”

The inquiry should not be restricted to the *assessed* value of the territory, but should be allowed to embrace every reasonable and proper means of ascertaining the actual value of all of the elements of wealth that together made up the value of the State. When one State is spoken of as wealthier than another, reference is not had to the *assessed* valuation of the lands, but to all of the resources of the State which are available for producing revenue.

The elements of wealth of West Virginia, even between Jan-

uary, 1861, and June, 1863, were the *coal*, the *oil*, the *gas*, and the *hardwoods*, which then as now abound throughout its eastern half. These elements of wealth have no place in the assessments for taxation which existed at the dates named. The assessments of land were made in Virginia every ten years. The assessment next preceding January, 1861, and June, 1863, was made in 1856, and manifestly affords no just ground for ascertaining the relative values of the two States as a basis on which the common public debt may justly or equitably be apportioned between these States.

In this connection we may say that there is now before us a copy of the official Report of the Auditor of Virginia, giving in tabulated form exact and full statements of the area and *assessed* value of each of the counties in the old State, of the lots in each of the cities and towns, and the value of all the personal property within the limits of the State. These tables of statistics, occupying nearly seven hundred pages of closely printed matter, give all the information that can be desired as to the *assessed valuation* of the real and personal property within the State in the years 1860 and 1861. But this apportionment of the common liability of the two States for the public debt should not and cannot equitably be made on the basis of the *assessed* values of the property of the States, because the assessed value was not in any case intended to express the actual value. Indeed, it was not intended to be more than two-thirds of the actual value of the property.

The assessment of 1856 did not embrace any of the elements of wealth which since 1861 have formed the principal basis of the wealth of the counties forming the State of West Virginia.

(2) It is proposed to modify the third paragraph of the order of reference by adding to it, at the end, the words "prior to January 1, 1861," the effect of which would be to direct that, even although the Commonwealth of Virginia had expended money within the territory now constituting West Virginia since the first of January, 1861, and prior to June 20, 1863, she should not be credited therewith in this account. Why not?

The "restored State of Virginia" had no existence prior to July, 1861, and then only to a limited extent and for certain purposes; but even that phantasm of a State, although "what seemed its head the likeness of a kingly crown had on," yet in time, when it had served its purpose, it faded back into the name and body of the present Commonwealth of Virginia. So

it would seem to be but just that if Virginia had at any time prior to the creation of West Virginia expended money within these western counties, and West Virginia reaped the benefit of it, she should be made to account for it.

(3) The fourth paragraph of the order of reference provides as follows, *viz*:

"4. Such proportion of the ordinary expenses of the government of Virginia, since any of the debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia, on the basis of the average to the population of Virginia, with and without slaves, as shown by the census of the United States."

Defendant proposes to modify this as follows, *viz*:

"The ordinary expenses of the government of Virginia, since any of said debt was contracted, *and prior to January 1, 1861*, on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States."

As stated, the proposed modification, standing alone, is unintelligible. The object of the inquiry is to ascertain what proportion of the ordinary expenses of the State government should be charged to the counties now forming West Virginia.

The expenses of the government of the restored State government from June or July, 1861, to June 20, 1863, when the State of West Virginia was created, were all furnished from the funds of the Commonwealth of Virginia, as appears from the acts of the legislature referred to in the progress of this cause. So that the latter date would be the proper one, if any amendment at all is to be made.

(4.) Paragraph 5 of the order of reference is as follows, *viz*:

"5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia."

Defendant asks to modify as follows, *viz*:

"5. And also on the basis of the *assessed valuation* of the property, real and personal, by counties, of the State of Virginia during the same period."

We have already called attention to this attempt to restrict the inquiry to the assessed valuation, in commenting upon the proposed modification to paragraph No. 2. The assessed value of real property never exceeded two-thirds of its market value, and,

as appears from the Auditor's Report of 1860 and 1861, the assessments of all lands in Virginia were made in 1856, and none later than that date. This assessment did not embrace, as distinct subjects of valuation, coal, or gas, or oil, or hardwoods, which constitute the basis of the large wealth of West Virginia. These all existed in 1861, and their presence was considered in estimating the value of land in transactions between vendor and vendee. Oil was produced in immense quantities in 1862, and was prepared for market at the town of Elizabeth, in West Virginia, in that year. These elements of wealth and value would have been taken into account in any proceeding for partition between joint owners, but were not considered in assessment for taxation.

From 1861 to 1865 West Virginia was the seat of war; few, if any, actual transactions of sale of lands took place, and no normal standard of valuation existed. The difficulties are great enough in the way of reaching the actual values of land in that State during that period without adding the inequitable standard of assessment for taxation.

(5) Paragraph 6 of the order of reference provides as follows, *viz*:

"6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union."

The defendant proposes to modify this section as follows, *viz*:

"6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the said period and prior to January 1, 1861."

That is, the defendant wishes to limit the period within which the Commonwealth should be charged with moneys received from the western counties to the 1st of January, 1861, while the court would extend that period to June 20, 1863. As we do not think that either date will make any difference in the account, we leave this matter to the court.

Defendant, in proposing the names of gentlemen from which a selection may be made by the court of a special master to state the account in this cause, has found it needful to advise the court that it has deemed it right not to consider any citizen of centers where "West Virginia certificates" are owned, or sold.

or traded in, and then it proceeds to nominate Mr. Charles E. Littlefield, of Maine.*

We state for the information of the court that one of the largest certificate-holders who has made himself known to us during this litigation is a good citizen of the State of Maine. The two gentlemen named by defendant are altogether unimpeachable personally. We would not have nominated them because Mr. Littlefield lives so far away from the counsel and from the records from which all the information required is to be had, and because Mr. John W. Yerkes is at present a member of the firm of Hamilton, Yerkes & Colbert, who are the counsel for the Baltimore & Ohio Railroad Co., which is the largest tax payer in West Virginia, contributing, as we are advised, one-eleventh of the taxes paid into the treasury. It has, therefore, a large interest in reducing the burdens which may rest upon that State and thereby lead to an increase of taxation.

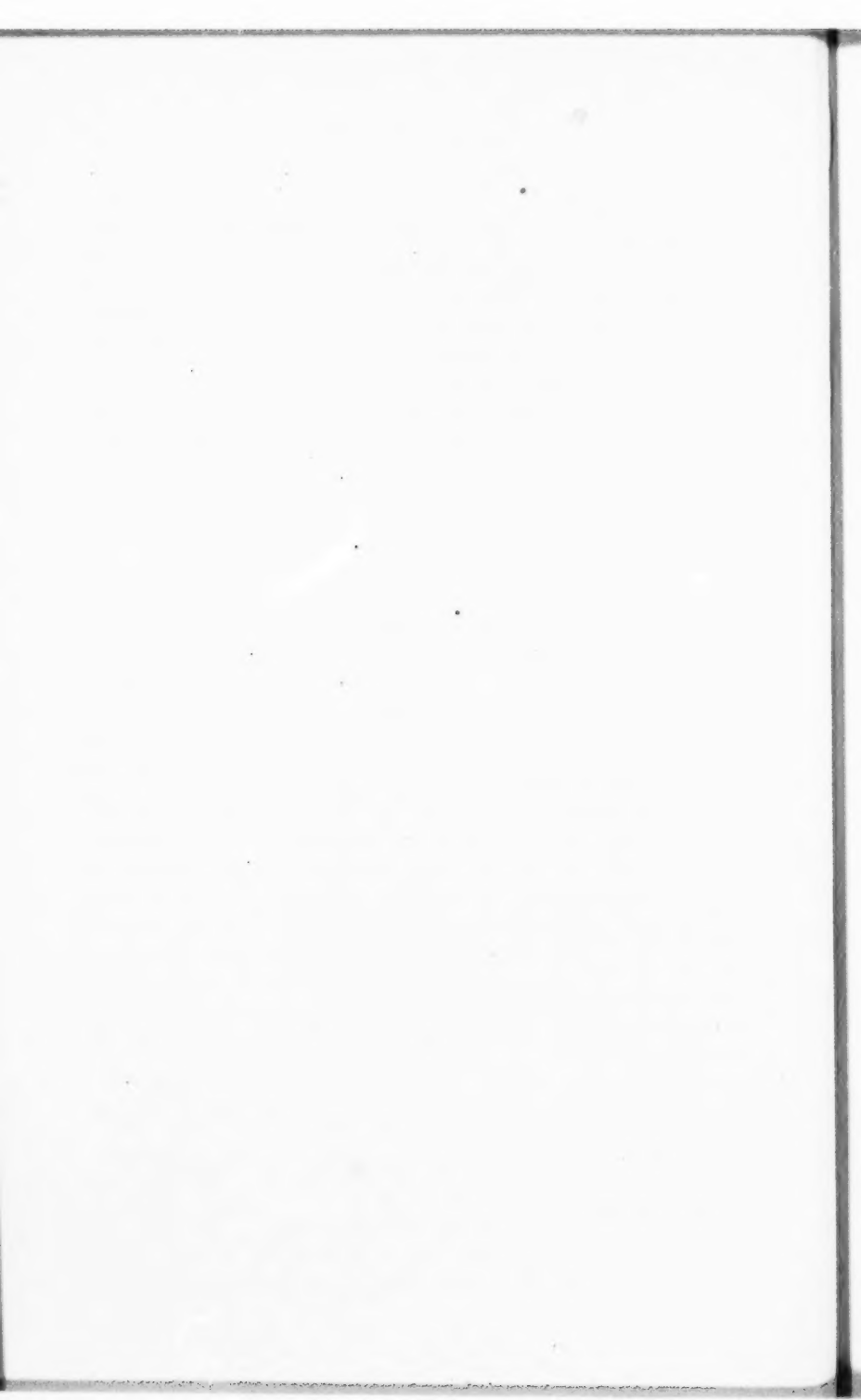
On behalf of the Commonwealth of Virginia, we announced to counsel for West Virginia our purpose to present to the court the name of Mr. John Prentiss Poe, of the city of Baltimore, but were informed by them that Mr. Poe was counsel in a chancery cause of Maryland *vs.* West Virginia, pending in this court, and was on that account ineligible. In this we concurred at the moment, but have since learned from unquestionable sources that Mr. Poe did file such a bill in his official character of Attorney General of Maryland, but that since the expiration of his term of office, now many years ago, he has been in nowise concerned in the cause. We therefore add his name to those already presented, and say that Mr. Poe is a graduate of Princeton, some time a bank clerk, and since 1858 a lawyer of recognized standing in the courts of Maryland and its neighboring States, and for many years a counsellor on the rolls of this court. He is the author of the standard works of Law and Equity Practice in Maryland and was some time the Attorney General of that State.

WILLIAM A. ANDERSON,
Attorney General of Virginia.

I concur in the above.

HOLMES CONRAD,
Of Counsel.

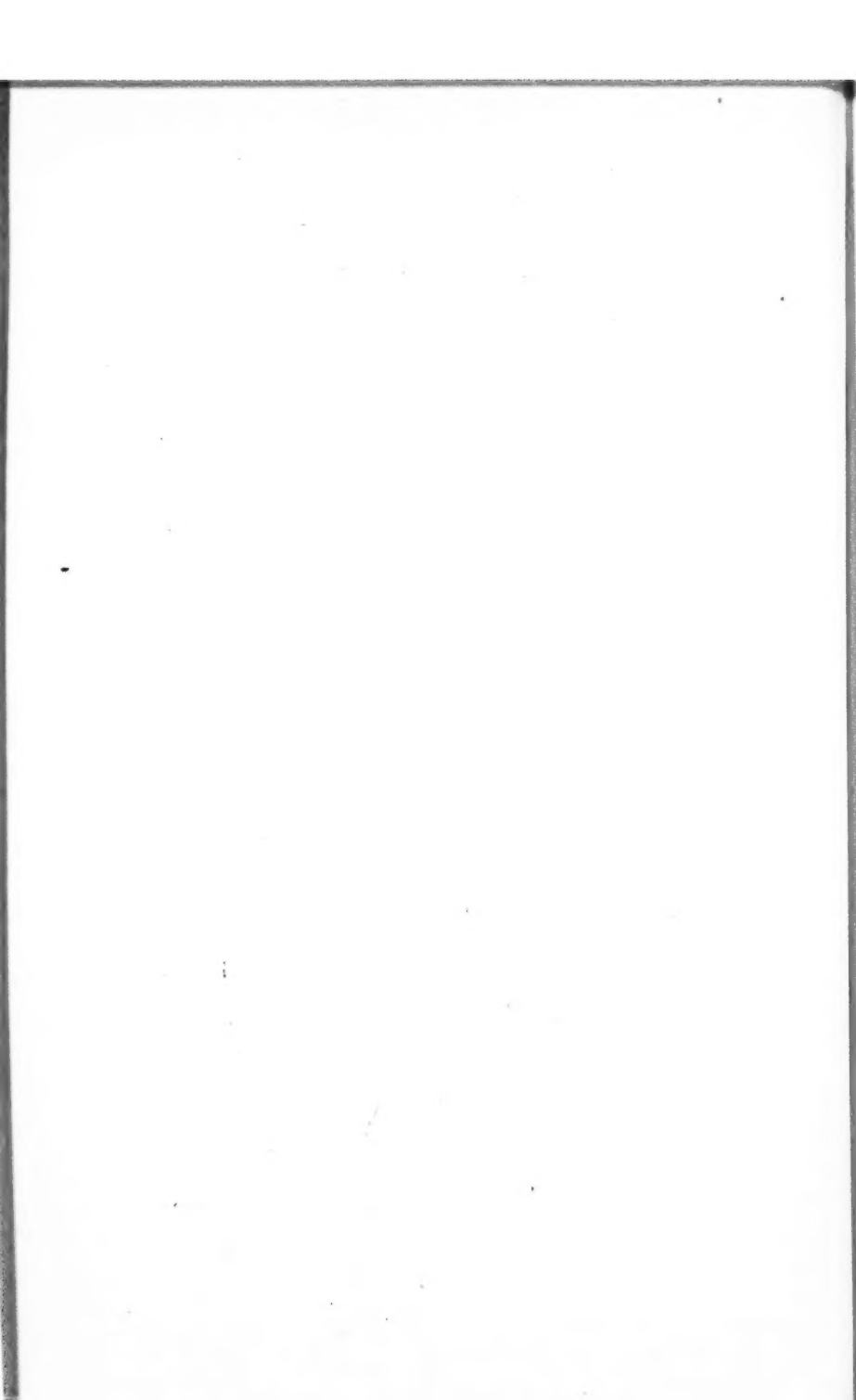
May 19, 1908.



Supreme Court of the United States.

OCTOBER TERM, 1907.

Report of Commission.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

ORIGINAL, NO. 4.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

REPORT OF COMMISSION—JOHN MARSHALL, CHAIRMAN.

Filed as an Exhibit for the Complainant.

The fact that Virginia in 1811-12 called upon Chief Justice Marshall and others of her leading citizens to devote some weeks or months of their time to a reconnaissance of the region lying between the Blue Ridge Mountains and the Ohio, for the purpose of learning the most desirable line of communication between the waters of the Eastern Seaboard and the Western waters, and that the Great Chief Justice and the eminent men who served with him on that Commission responded to that call and devoted themselves to the arduous service which its acceptance involved, is evidence of the profound interest which in the early part of the last century the people of Virginia and her leading citizens took in that subject, and the importance which they attached to it.

The report of this historic Commission is therefore reprinted and filed as an exhibit for the complainant in this cause.

Col. Claudius Crozet, an eminent civil engineer, who, after having served as an engineer under Napoleon, and afterwards as Professor of Mathematics or Engineering in the U. S. Military Academy at West Point, was for a number of years State Engineer

of Virginia, and some of the most important of her works of internal improvement were begun under his direction.

In one of his reports he refers to the service rendered by this Commission in the following language:

"The first notice of the connection of the eastern and western waters is found in a report, made at the close of 1812, by the commissioners appointed by an act of the preceding session, 'for the purpose of viewing certain rivers within this Commonwealth.' The commissioners, John Marshall, James Breckenridge, William Lewis, James M'Dowell, William Caruthers, Andrew Alexander, examined the James river, from Lynchburg up, crossed the mountains, and descended with much difficulty, and indeed personal danger, the hitherto unexplored New river. They went through this arduous task with a zeal and perseverance worthy of such men.

"A plain sluice improvement of the James and Jackson's river, up to Dunlap's creek; thence a turnpike road, across the Alleghany mountain, which has been made since, and finally a sluice navigation of the Greenbrier, New, and Kanawha rivers were, at that early day, all they thought proper to recommend.

"A remarkable, and in our day, curious passage, occurs in their report. 'Your commissioners submit with diffidence the following propositions: First, that boats impelled by steam may be employed successfully on New River * * *. But they beg leave to say, that the currents of the Hudson, of the Mohawk, and of the Mississippi, are very strong; and that a practice so entirely novel as the use of steam in navigation, will probably receive great improvement, and the power itself be so diversified as to be applied in new and different situations, &c.' These remarks, at the very dawn of steam navigation, show, on their part, much sagacity and forethought."

See Report of Colonel Claudius Crozet, late State Engineer, to the General Assembly of Virginia, 1848.

WILLIAM A. ANDERSON,

Counsel for Virginia.

March, 1908.

Besides the Great Chief Justice, the gentlemen who served upon this Commission were James Breckenridge, distinguished as a soldier, and statesman, and esteemed by contemporaries as the equal in ability, though not in oratory, of his brother, John Breckenridge, of Kentucky; William Lewis, a patriotic citizen of

the highest character, a near relative of Col. Charles, and General Andrew Lewis, of Point Pleasant fame, and a worthy scion of such illustrious lineage; James M'Dowell, one of the gifted men of his generation, who afterwards rendered eminent service as a member of Congress, and as Governor of the Commonwealth; William Caruthers, a leading citizen of the Valley of Virginia, and a farmer and business man of very high character and standing; and Andrew Alexander, surveyor, engineer, representative citizen, a man of skill in his profession, and remarkable for his public spirit.

STATE OF VIRGINIA.

INLAND NAVIGATION AND IMPROVEMENTS.

PREAMBLE AND RESOLUTION.

FOR RE-PRINTING THE REPORT OF THE COMMISSIONERS ON THE
NAVIGATION OF THE GREAT KANAWHA, &C.

[Agreed to by both Houses of Assembly, February 14, 1814.]

WHEREAS, it would greatly promote the welfare of this Commonwealth, and the prosperity of our sister States, to form a more intimate connexion between the Eastern and Western Waters of the United States; and, with a view to that object, the General Assembly of Virginia, at a former session, appointed Commissioners to survey the head waters of James-River and the Great Kanawha, with instructions to ascertain the practicability of extending their navigation to the base of the chain of mountains which divides them, and at the shortest and easiest portage across it; a trust which was accepted and fulfilled, by the Commissioners who acted therein, in a manner that entitles them to the thanks of their country: And, as the result of their labors has never been presented to the Legislature of the Union, nor to the governments of the several States, who cannot but feel an interest in the accomplishment of an enterprise so important to the arts, manufactures, and commerce of the United States—

Resolved, therefore, That the executive of this commonwealth

be, and they are hereby empowered and requested, to cause the Report of the Commissioners to be re-printed, and the Map and References accompanying it to be reduced to a convenient scale, engraved, printed, and annexed to the Report; and, reserving two hundred and fifty copies thereof for the use of the General Assembly, to forward a copy to each of the Commissioners whose names are subscribed to the Report, to each Member of the Congress of the United States, and to the Executives of the several States and Territories.

PROCEEDINGS OF THE COMMISSIONERS.

LETTER OF MR. MARSHALL, ONE OF THE COMMISSIONERS.

A communication from the Governor, enclosing a letter from the Honorable John Marshall, and a report from the Commissioners who executed the act of the last session, entitled "An act appointing Commissioners for the purpose of viewing certain Rivers within this Commonwealth," was laid before the house.

The said letter and Report were read as follows:

Richmond, December 26, 1812.

SIR:—I hasten to submit to your Excellency, for the purpose of being laid before the General Assembly, the Report of the Commissioners who executed the act of the last session, entitled "An act appointing Commissioners for the purpose of viewing certain Rivers within this Commonwealth."

To their distance from each other, and the consequent difficulties attending the interchange of sentiment, and the attainment of their respective signatures, is to be ascribed the delay which has taken place in the performance of this part of their duty.

The more detailed report, to which the enclosed refers, is not yet received, but it is expected in a few days, and will then be transmitted to your Excellency. It was not thought advisable longer to withhold the general report, for the purpose of accompanying it with that more in detail, to which it refers.

I have the honor to be,

Sir, with great respect,

Your obedient servant.

J. MARSHALL.

His Excellency Governor BARBOUR.

INLAND NAVIGATION.

REPORT.

To the Honorable the Speaker and Members of the General Assembly, the undersigned Commissioners, named, with others, in the act entitled "An act appointing Commissioners for the purpose of viewing certain Rivers within this Commonwealth,"

RESPECTFULLY REPORT—

That, supposing the autumn to be the season which afforded the fairest prospects for giving effect to the views of the Legislature, as expressed in their act, your Commissioners agreed that a meeting should be called on the first of September, at Lynchburg. The number required by law, for the execution of the service they were directed to perform, having assembled, and the necessary preparations having been made, your Commissioners began at the Bridge at Lynchburg, to view James-river, and to take its level by sections to the mouth of Dunlaps-creek. Mr. Andrew Alexander, the surveyor of Rockbridge county, had been engaged to execute this duty under their direction. To his report, which your Commissioners believe to be accurate, they beg leave to refer, as exhibiting, in minute detail, the information required by the law.

As an actual measurement of the whole river would have employed so much time as to defer the completion of the work, until high waters might defeat the object of the Legislature, and was rendered the less necessary by previous surveys; distances were in general conjectured. The eye, aided by a time-piece, and occasionally corrected by actual measurement, furnished information, which, though not perfectly exact, was believed not to vary much from the truth, and to be substantially sufficient. Those places which present serious obstacles were measured by the chain, and the elevation was taken throughout by a spirit level.

On that part of the river which is comprised within the charter already granted, your Commissioners presumed that little, if any, information is expected from them, other than will be found in the annexed report of Mr. Alexander.

From Beall's Bridge, or Crow's Ferry, to the mouth of the Cow-Pasture, no difficulty presents itself, which may not be with

certainly surmounted. The falls are no where formidable; there are long stretches of smooth water, and the shallows may be so deepened as to afford water for boats bringing down from six to eight tons, and carrying up from four to six tons, if not throughout the year, through all but a very inconsiderable portion of it. Your Commissioners give the opinion, unanimously, and with great confidence, that the navigation from Crow's Ferry to the mouth of the Cow-Pasture, may, with improvements by no means expensive, be rendered as certain, as useful, and as permanent, as the navigation from the same place to Lynchburg; and that it may be used at all times when the navigation to Lynchburg can be used, with boats carrying an equal burthen—indeed, that it may be rendered more safe and less laborious, than that from the mouth of the North Fork to Lynchburg now is.

From the mouth of the Cow-Pasture to the mouth of Dunlap's-creek, the difficulties become more considerable, and their removal will require greater expenditures of money. The mass of water diminishes, and the elevation increases.—The shoals become longer and shallower, and the intervals of smooth water shorter. Yet, this rugged navigation, though totally unimproved, is now used during high water. Boats, laden with the produce of the country, pass every year from the mouth of Dunlap's-creek to Richmond. It is, therefore, proved to be, even at this time, practicable for some portion of the year. This portion varies with the seasons. Most commonly, it commences in November, and terminates late in May, or early in June.

That, by the removal of rocks, now lying promiscuously and irregularly through the bed of the river, which it will be necessary in only a few instances to blow, and by the judicious application of labor, to the collection of water in narrower spaces than it now covers, this navigation may be rendered much more secure and beneficial, and the time during which it can be used may be considerably extended, will not admit of doubt.—Whether this portion of the river may be rendered at all times boatable, depends on the depth of water to be collected in particular channels by such means as are applicable to the object.

Some of your Commissioners have been personally engaged in opening the navigation of the North Fork of James-river, through Rockbridge. They are decidedly of opinion, that the river denominated "Jackson's," contains as far as Dunlap's-creek, more

water and less formidable obstructions than were found in the North Fork. Yet the North Fork, though its improvement is far from being complete, is now actually used to great advantage, and is not much inferior to the river below.—Some experienced and judicious boatmen who were employed on the expedition, who are well acquainted with the river and its navigation, unite in the declaration, that, if the means be taken which ought to be employed, that part of James-river which is between the Cow-Pasture and Dunlap's-creek, may be used by any boats which will be capable of continuing their voyage to Lynchburg.

Your Commissioners concur in this opinion; and they take occasion now to remark, that should it be deemed advisable still to adhere to the system of improvement heretofore used in the upper part of the river, the difficulties of this navigation would, they think, be much diminished by several facilities which might be given to it. They would particularly suggest chains, with buoys fastened in rocks or otherwise, or walls on which men may walk, of which boatmen might avail themselves to lessen the labor of ascending places of peculiar difficulty; and thus either to increase the load which may be carried up the river, or to diminish the number of persons necessary for carrying up a given load. They will also mention a fact deemed favorable to the object contemplated by the Legislature. It is this: although the cold may be more intense in the bosom of the mountains than below, this part of the river freezes over.

It will perhaps save the honorable the members of the Legislature some calculation, to observe, that the distance from Lynchburg to the commencement of the Blue Ridge is stated, in the report of Mr. Alexander, to be twenty-five miles one-fourth and thirty poles; the elevation to be one hundred and eleven feet eight inches; shewing an average elevation of four and an half feet to the mile.—The distance through the mountain, that is from Raccoon Island to the mouth of the North Fork, is eight miles one-fourth and forty-nine poles, and the elevation one hundred and one feet six inches, giving an average elevation of upwards of twelve feet to the mile. The distance from the mouth of the North Fork to Crows Ferry, or Beall's Bridge, the highest point to which navigation is to be carried by the James-River Company, is stated at twenty-six miles and thirty-eight poles, and the elevation is one hundred and thirty-one feet four inches; making the average elevation five feet to a mile.

The distance from Beall's Bridge, or Crow's Ferry, to the mouth of the Cow-Pasture, is stated at thirty-six miles fifty-nine poles, and the elevation is one hundred and ninety feet three inches, making the average elevation five and an half feet nearly to a mile. The distance from the mouth of the Cow-Pasture to the mouth of Dunlap's-creek, is stated at twenty-three miles three-fourths and twenty poles, and the elevation is two hundred and twenty-eight feet three inches, making the average elevation nine and an half feet to the mile.

Having reached Dunlap's-creek, your Commissioners proceeded to view and mark out what appeared to them to be the best and most direct way for a turnpike road from the mouth of that creek to the most convenient navigable point on Greenbrier river.

With some inconsiderable deviations, which will appear in the report of Mr. Alexander, already referred to, and some others which will be suggested, the road now leading from the mouth of Dunlap's-creek, by Bowyer's Sulphur Spring, to Anderson's Ford, over Greenbrier, at the mouth of Howard's-creek, is believed to be the most eligible which can be made. To that part of the road which passes from the mouth of Dunlap's-creek to the old Iron Works, a distance of about five miles, there are considerable objections, which your Commissioners are inclined to believe may be diminished. The road crosses the creek eight times, and the ground, during the winter and spring would, if much used and not well covered with stone or gravel, be much cut and be very deep. The creek too is frequently so high as not to be fordable.

Should it be found practicable, which your Commissioners believe to be the fact, to render Dunlap's-creek navigable up to its falls, some distance below the old Iron Works, these inconveniences would be in a great measure removed.

Should it be deemed unadvisable to carry navigation up Dunlap's-creek, a direction, as is understood from some of the inhabitants of that neighborhood, may be given to the road, so as to avoid five crossings of the creek, and at the same time shorten the distance. No attempt to view this way was made, because guides could not readily be procured, and your Commissioners feared that, by devoting too much time to a minor object, on which complete information is attainable with ease and certainty through various channels, they might hazard the failure of others which were believed to be of much importance.

The road from the Sulphur Spring to Greenbrier crosses How-

ard's-creek, which is often not fordable, six times, and is in a few places attended with some difficulty. A small improvement may be made in it, and the steepest part avoided, by returning it, near the river, to the ground over which it formerly passed, and from which it has been lately taken.

The road over the mountain has been attentively viewed, and the deviations recommended, from that now in use, carefully and plainly marked. Your Commissioners feel much satisfaction in stating, that the elevation of this part of the road may, in the most unfavorable places, be reduced to an angle of five degrees with the horizon. By occasionally removing the earth, for small distances, this angle may be still further diminished. It is believed to be susceptible of improvement on as easy terms as any other road, since the materials for a turnpike are every where convenient, and not more levelling will be necessary than must be expected in passing through a mountainous country.

Your commissioners proceeded down the Greenbrier river in the boat in which they ascended the James. The season had been remarkably dry, and the water was declared by the inhabitants to be as low as at any period within their recollection. It frequently spreads over a wide bed covered with large stone, and is, in its present unimproved state, and at the season when it was viewed, so very shallow for the greater part of its course, as not to swim an empty boat. The labor of removing stone, and of dragging the boat over those which could not be removed without implements provided for the purpose, was so great, that your Commissioners at one time were unable to advance only three miles in two days, even with the assistance of a horse and of many additional laborers. In part of the river the shoals are frequent and long, and the falls, as the report of Mr. Alexander will shew, considerable. At the great falls, which is the most important of them, the descent is twelve feet in forty-eight poles. There is no perpendicular fall at this place, but one continued rapid, with large rocks, irregularly interspersed through the bed of the river. Near the mouth of the river there is a flat rock, which continues for about two hundred and forty poles, with many irregular apertures or fissures through which the water passes. Although, in the usual state of the river, this rock is covered with water of sufficient depth for navigation; yet, such was the drought of the last autumn, it was necessary to drag the boat over its whole extent.

These difficulties present obstacles to navigation during a season when the waters are remarkably low, which can be surmounted only at considerable expense.

But, from the best information your Commissioners can obtain, and they believe it to be correct, the Greenbrier is seldom so low at any season as it was during the last autumn; and it seldom if ever fails, for eight or nine months in the year, to be at least two feet higher than when viewed by your Commissioners; a depth of water unquestionably sufficient for the purpose of navigation. The testimony given by the inhabitants to this fact, was corroborated by appearances on the river. The indications of a recent considerable diminution of water were not to be mistaken.

On an attentive consideration of the obstacles which were found by your Commissioners to be great, while the river remains in the state in which they viewed it, they are unanimously and decidedly of opinion, that its navigation may be rendered as safe, as certain, and as easy as that of the James, at all times, except when the water is unusually low. The rocks are in general loose, and may be removed without extraordinary difficulty, so as to afford a tolerably smooth passage to boats; and, by collecting the water into narrow channels, a sufficient depth may be obtained, with the exception of a short period in a very dry year, to swim any boat which can be brought at the same time down James-river. But so scanty is the supply of water in a time of uncommon drought, that doubts are entertained whether there may not be a short season of the year during which, unless a considerable expense be incurred, the navigation must be suspended. Though aided by men and horses, ten days of unremitting labor were consumed in passing from the mouth of Howards-creek to the mouth of Greenbrier river, a distance not much exceeding forty-eight miles. In the month of June, the same voyage, if not retarded by measuring the river, might have been performed in a single day. Some of your Commissioners, however, are of opinion, that the Greenbrier may, without great additional expense, be rendered at all times passable for boats carrying half a load.

In addition to the shallowness of the water, (an inconvenience which is common to all rivers as you approach their sources, and which disappears for eight or nine months in the year) and to the rocks which have been mentioned, the obstructions to the navigation of the Greenbrier consists in its falls, and in the general rapidity of its current.

The great falls alone are of sufficient magnitude to merit particular attention. These unquestionably admit of being rendered navigable, either by opening a sluice judiciously through them, or by locks. The latter would be most expensive, but would leave the navigation less laborious.

The rapidity of the current may be estimated by observing that the descent in forty-eight miles and eighty-four poles, is three hundred and sixty-two feet ten inches, between seven and eight feet to the mile.

This current will present no difficulty to a boat descending the river. To one ascending it, the labor will be considerable, but not so considerable as in some parts of James-river.

The night of the 28th of September, was passed among the islands in the mouth of Greenbrier; and on the morning of the 29th, your Commissioners entered New-river.

The New-river, or that part of the Great Kanawha which is above the mouth of Gauley, having to search its intricate way, and force a passage through a long chain of lofty and rugged mountains, whose feet it washes, exhibits an almost continued succession of shoals and falls, from which the navigator is sometimes, though rarely, relieved by a fine sheet of deep placid water.

The difficulties encountered in descending this river were of a character essentially different from those which were experienced in the Greenbrier. Uncommon as had been the drought, the supply of water was abundant. The boat sometimes, though rarely, rubbed upon a shoal; but in every such case it was apparent that a sufficient passage might be opened without much labor or expense. The velocity of the current and the enormous rocks which often interrupt it the number and magnitude of the rapids and falls, the steepness, cragginess and abruptness of the banks, constitute the great impediments which at present exist to navigation between the mouth of the Greenbrier and the Great Falls of Kanawha.

The distance from the mouth of Greenbrier to Bowyer's Ferry, is forty miles one quarter and forty-six poles, and the descent is four hundred and sixty-six feet seven inches; that is, eleven feet six inches in each mile. In general, there is much sameness in the appearance of this part of the river. Long rapids, frequently terminated by a fall of from five to ten feet, in a distance of ten, twenty, thirty, and sometimes a greater number of poles; an intervening space, sometimes more, sometimes less considerable,

of swift or smooth water; rocks, sometimes above the surface, sometimes near it, so as to require great caution to save a boat from dashing on them; a copious stream, with a current commonly impetuous, constitute its leading characteristics.

Falls too great to come within this general description, will be particularly noticed.

Brook's Falls are about four miles and one-fourth below the mouth of Greenbrier. The water descends thirteen feet seven inches in fifty poles. In its most rapid part the descent is five feet ten inches in fourteen poles. The boat was navigated through this place.

A much more formidable obstruction is the falls at Richmond's Mill. These are designated in the neighborhood by the name of the "Great Falls of New-river," but are generally called at a distance, "Lick-Creek Falls."

At this place the water may with propriety be said to fall perpendicularly twenty-three feet. For this distance, the sheet which dashes over the summit is intercepted only by huge fragments of broken rock, which, having been successively disjoined from the brink of the precipice, have fallen into the foaming basin below, where, piled on each other, they form one or two benches that break the cataract. A small distance lower down is another fall of three or four feet.

Here, for the first time, the boat was taken out of the water and let down by skids.

The ground along which a canal may be carried around these falls, pursuing the course of Richmond's mill-race, was measured, and the elevation taken. The descent was found to be twenty-two feet nine inches, in one hundred and eighty-one poles.

This estimate excludes a part of the falls, between five and six feet of which are just above the head of Richmond's mill-race.

The bottom of the river for some distance above these falls, is a hard rock, often appearing above the surface, and much covered with movable stones, some of which are very large. The bottom of the mill-race appears to be of the same description.

From Bowyer's Ferry to the Falls of the Great Kanawha, was estimated at nineteen miles and fifty-eight poles, in which distance the river falls three hundred and thirty-one feet; that is, seventeen feet to a mile. The honorable the legislature will perceive, that below the ferry the descent, in the same distance, is greater than above. For a part of this space, the scene is awful and dis-

couraging. The vast volume of water which rolls down New-river, and which, far above the ferry, often spreads, without becoming shallow, over a bed three or four hundred yards wide; is seldom more than one hundred or one hundred and fifty yards wide. In some places, for a mile or more in continuation, it is compressed by the mountains on each side, into a channel of from twenty to sixty yards wide; and even these narrow limits are still more narrowed by enormous rocks which lie promiscuously in the bed of the river, through which it is often difficult to find a passage wide enough for the admission of a boat. In some places the bank is formed of rugged and perpendicular cliffs or entire rock, which appear to be twenty, thirty, and forty feet high; in others, enormous, but unconnected, rocks dip into the water.

There are unequivocal indications of the river's having risen, in these narrows, from thirty to forty feet perpendicularly.

Immediately above the mouth of Gauley, the river opens and presents a beautiful sheet of deep smooth water, which is succeeded by the rocks over which it dashes, and forms the Great Falls of Kanhawa. The height of these falls is twenty feet four inches. With its name, the river loses its wild and savage aspect. It is no longer confined by rugged cliff, by mountains barely separated from each other, nor interrupted by enormous masses of rocks which are scarcely to be avoided.

Within a short distance above the falls, the current is not unmanageably swift, nor the rocks over which it passes uneven. Below, quite to the rocks which have fallen from the brink over which the cataract rushes, is a deep smooth and beautiful basin. The river is so wide as to rise, in the greatest freshets, only six or seven feet. The falls themselves constitute the impediment, and the only impediment at this place.

Your Commissioners have deemed it proper to state in their full strength, the difficulties which are to be surmounted in opening the intercourse between this part of the state of Virginia and the western country; and to put the legislature, as far as is possible, in possession of the testimony on which their opinion is formed, as well as of their opinion. If, misguided by their conviction of the importance of the object, they are too sanguine in their hopes of its accomplishment, the facts now communicated will enable the General Assembly to correct the mistaken conclusions which have been drawn, and to determine on the course which will best promote the interests of the public.

The practicability of rendering the Greenbrier navigable has already been stated. The system which may be found best adapted for the improvement of James-river, will be equally applicable to the Greenbrier, and will be equally successful.—The one river and the other will be rendered more or less valuable as more or less labor and skill may be employed on them; but there can be no mistake in saying that, without incurring an expense which any would pronounce extravagant they are both capable of being brought into extensive use. Not only in descending, but in ascending also, these rivers may be navigated to great advantage.

With respect to New-river, a judgment cannot be formed quite so decisively, nor pronounced quite so confidently. The difficulties are great, and deserve to be seriously considered.

The boat which conveyed your Commissioners, passed from the mouth of Greenbrier, to the place where their expedition terminated, without being taken out of the water, except at the Great Falls of New-river, and at the Great Falls of the Kanhawa. It was navigated in the usual way through all the other difficult places which abound in New-river, except two—both below Bowyers Ferry. Through these it was conducted by ropes.

The boat was not laden, nor was it empty. In addition to the number of hands usually employed in navigation, it carried between two and three thousand weight. The greater part of this burthen was taken out in the most difficult places; but in many of considerable magnitude, it remained in the boat. Where the vessel was guided by ropes, the necessity of resorting to this expedient was occasioned solely by the intervention of rocks, which can be removed.

It is also worthy of notice, that this voyage was performed by boatmen, who, having never before seen the river, were reduced to the necessity of selecting their way at the moment, without the aid of previous information.

The only impediments to the descent of the boat, except at the two great falls already mentioned, were rocks lying so near the surface of the water as to strike the bottom while shooting over them. At the usual height of the river, these rocks would be entirely covered, and all danger from them be removed; but others would be placed in a situation to expose a boat to equal hazard. It is therefore necessary, even for the descending navigation, to open a plain and broad sluice through all the rapids and falls, so as to relieve boats navigating the river from all danger of

being dashed against the rocks. This may be effected by removing some and blowing others.—This sluice may be so conducted as to graduate the falls where they are most sudden, and thereby, in some degree, to diminish the impetuosity of the current.

Brook's Falls, the Great Falls of New-river, and the Great Falls of Kanhawa, will probably require and admit of a different course.

The first of these which is the least formidable of the three, will present three alternatives to the election of those who may be engaged in improving the navigation.

First—One or more locks, which may unquestionably be constructed at this place.

Second—A canal, which is already almost formed, on the north side of the river. Its completion would require that it be opened for a short distance both where it would receive the water at the head of the falls and where it would empty itself below them.

To the eligibility of this canal, there can be but one objection. There may be impracticable rock, now hidden by the earth, so near the surface as to render this plan unadvisable.

Third—To open a sluice in the river, along its northern bank, and graduate the fall as far as may be compatible with that system of operation.

The Great Falls of New-river must be turned, by using a canal to be cut on the southern side, pursuing nearly the tract of Richmond's mill-race. Should locks be employed, it will most probably be found advisable to place them in this canal. Should locks be dispensed with, there will be no difficulty in descending through this channel, but the toil of ascending must, at this place, be considerable.

At the Great Falls of Kanhawa, there is, near Morris's mill, a very eligible place for locks. If a canal be preferred, there is every reason to believe that the ground will admit of one, which may be so extended, and the fall thereby so graduated, as to afford a safe passage to loaded boats.

These observations are formed on the state of the river when viewed by your Commissioners.—It will readily occur, that they cannot judge with certainty of the changes which may be brought about by a great rise of water.

It would seem most probable, that by such rise the falls would be diminished, because the water at their feet would pass off less rapidly than at their head. But the apprehension cannot be en-

tirely discarded, that in the narrows, which have been mentioned, the torrent would, in a flood, be too impetuous to be trusted. It is probable, that a moderate elevation of the water would rather facilitate the passage of the boats; at least of those descending the river; but that great floods would suspend the navigation.

Having stated their view of this subject, your Commissioners will only add their opinion, that the New-river may be relied on with certainty, for the transportation of articles from east to west.

On the practicability of using this channel of conveyance for the transportation of articles from the western country, towards the rivers which empty into the Atlantic, at least so much of it as lies between Bowyer's Ferry and the Great Falls of Kanhawa, they must speak with less confidence. The great difficulty consists in the velocity of the current. For several miles, between Bowyer's Ferry and the Falls, it is believed that a canal would be impracticable. The river is susceptible of no other improvement than may be made in its channel, or on its banks. The current is often too rapid to be stemmed by a boat impelled by oars; and the water too deep to admit the use of poles. If a channel, sufficient for the safe passage of vessels, be opened, still some other means than oars or poles must be devised for impelling them up the stream.

Your Commissioners submit with diffidence the following proposition:

First—That boats impelled by steam may be employed successfully on New-river.

With the capacities of this powerful agent they are too little acquainted to speak with confidence of the use which may be made of it in the waters of Virginia. Elsewhere, it has certainly been applied with great advantage to the purposes of navigation. Neither have they that intimate knowledge of the velocity of the currents, against which vessels have been propelled by it, to compare them with that of New-river, and to hazard any decided opinion on the comparison.—But they beg leave to say, that the currents of the Hudson, of the Mohawk, and of the Mississippi, are very strong; and that a practice so entirely novel as the use of steam in navigation, will probably receive great improvement, and the power itself be so diversified in its modifications, as to be applied in new and different situations, as their exigencies may require. It is believed, that a sufficient depth of water is certainly

obtainable, but whether sufficient employment may be found, to justify the use of a vessel which must, in any state of things, be constructed at considerable expense, is a question your Commissioners cannot attempt to solve.

Second—Should it be found impracticable to apply steam with advantage to the navigation of New-river, it is respectfully suggested, that between the Great Falls of Kanhawa and Bowyer's Ferry, resort may be had to horse labor.

To give this facility to the navigation, it will be necessary to construct a horse-way along the bank of the river at different heights, or at the most common height of the water. The objection that such way cannot be used at all times, will lose much of force, when it shall be recollected that the navigation up the river will admit of being suspended for considerable intervals, with less injury to those who use it, than that which conveys to the western country articles imported for general consumption. The construction of this way, however, will require the blowing of a great quantity of rock, and will, consequently, be expensive.

Third—Should neither of these expedients be deemed eligible, it is respectfully suggested, that boats may be forced up the current, where it is too rapid for oars and too deep for poles, by the aid of chains fastened in the rocks on the bank.

Whatever doubts may be entertained respecting the navigation for boats ascending the river between the Great Falls of Kanhawa and Bowyer's Ferry; your Commissioners are entirely persuaded of the practicability of using it advantageously between the ferry and the mouth of Greenbrier.

In obedience to the law under which they have acted, your Commissioners will now proceed to state their ideas of the sums of money which will probably be necessary to open the river and make the road they have viewed.

No part of their duty has been performed with less confidence than this.

It will readily occur to the legislature, that no estimate of expense of executing so great a work as that which is to afford to the western parts of Virginia the means of conveying the produce of their lands to market, and probably to connect Virginia commercially with her sister states in the west, can have just pretensions to exactness.—Were the system of improvement, and the extent to which that system is to be carried, accurately defined; any calculations which could now be made, even by professional

men, of the sum necessary for its execution, might be found to vary widely from that which would be actually expended. Still less precision can be looked for in the calculations of your Commissioners.

But it must be apparent that the expense of improvement will essentially depend on the object for which the improvement shall be made.

If the views of the legislature shall be limited to the conveyance of articles, the growth of the upper country, down James-river, the cheapness of that conveyance will certainly depend much on the degree of perfection to which the improvement may be carried; but the river, being the only channel of conveyance, will, if merely practicable, be used to some extent.

If the views of the legislature shall extend to a free commercial intercourse with the western states, or any of them, the channel selected for that intercourse will come into competition with others which now exist or may be opened, and must recommend itself to a preference by the advantages it offers. With a view to the latter object, no improvement ought to be undertaken but with a determination to make it complete and effectual.

The estimates of expense were more particularly made by Mr. Caruthers, who has been personally engaged in opening the North Fork through Rockbridge. This gentleman made his calculations on the plan which has been adopted by the James-River Company, with such improvements as would better adapt that plan to steam navigation. According to his estimate, one hundred and ninety thousand dollars will be sufficient to accomplish the work from Beall's Bridge, or Crow's Ferry, to the Falls of the Great Kan-hawa, including the road.—This estimate is formed on a comparison of the impediments to be removed, with those he had himself encountered in opening the North Fork of James-river. Some others of your Commissioners, who have too little knowledge of the labor necessary for the accomplishment of objects of this description, to confide themselves, in their own judgment, much less to recommend it to the confidence of others, are so impressed with the magnitude of the difficulties they have seen, as to be unable to persuade themselves that the work can be completed for the sum at which it has been estimated. That estimate does not appear to them to be extravagant, if the descending navigation alone be contemplated. To make the ascending navigation such as will entitle it to extensive use, and give this a preference over

other routes, they submit, though with much diffidence, the opinion that at least a half a million, perhaps six hundred thousand dollars, will be requisite.

From the mouth of Dunlap's-creek to the mouth of Howard's creek, is twenty-six miles and forty-four poles. For the first mentioned place to the summit of Alleghany mountain, is sixteen miles and thirty-six poles, and the elevation is nine hundred and forty-eight feet, which makes an angle with the horizon of less than three-quarters of a degree. From the summit of the mountain to the mouth of Howard's-creek, the distance is twelve miles and eight poles, and the descent is eight hundred and thirty-eight feet seven inches, making with the horizon an angle of about three-quarters of a degree. There are no peculiarities attending this route, which will render any plan the legislature may prefer for turnpiking it, more costly in its application to this road, than to others which have been constructed in various parts of the United States. It is now at least equal to, perhaps better, than any other of equal distance in the same part of the country.

In presenting to the honorable the legislature the advantages which, in the opinion of your Commissioners, will probably accrue to this state from executing the work to which their report relates, it will be necessary to divide this subject, and to consider, separately—first, those which may reasonably be expected to result from executing it in part; next, those which are to be looked for from executing it in the whole.

Should the navigation of James-river be carried up to the mouth of Dunlap's-creek, and a turnpike road be made over the Alleghany mountain, although nothing further should be done, a considerable impulse will be given to the agriculture, and a valuable effect produced on the wealth and population of a considerable tract of country. It cannot reasonably be doubted, that Bath, a part of Botetourt, and a great part of Greenbrier, Monroe, and perhaps even Giles, would find a real interest in searching for a market on James-river, for the produce of their soil, if such safe and cheap conveyance were afforded them as might be given by the improvements which have been stated.—Agriculture would mingle more than heretofore with grazing; and industry would flourish when the reward of industry should be attainable. Those more western counties, whose distance might forbid the attempt to transport grain manufactured into flour, or distilled into spirits, to the markets on James-river, might still be encouraged to bring

to those markets, salt, salted provisions, and various manufactures of hemp. An increase of population would result, not only from the check which this state of things would give to emigration, but also from its operation on the inhabitants, in other respects.

Other parts of the state would derive corresponding advantages from their intercourse with a section of the country which would have more to sell and more to purchase than at present. By the augmentation of the wealth and population of a part, not only would those belonging to that part be improved in their circumstances, but the whole would be more powerful, and the public burdens being more divided, might press less heavily on each individual.

These advantages would probably be extended by improving the navigation of the Greenbrier also.

Should New-river be rendered a safe and easy channel of communication, between the Ohio and the commercial towns on James-river, the subject will assume a more important aspect, and the advantages may be estimated on a larger scale. Not only will that part of our own state which lies on the Kanawha and on the Ohio, receive their supplies and send much of their produce to market through James-river, but an immense tract of fertile country, a great part of the states of Kentucky and Ohio, will most probably give their commerce the same direction. All that part of the state of Kentucky which lies above Louisville, and all that part of the state of Ohio whose trade would pass through the river of that name, might reasonably be expected to maintain a large portion of their commercial intercourse with the Atlantic states, through the James or Potomac. Certainly in a contest for this interesting prize, the states through which those rivers run have geographical advantages, the benefit of which they can lose only by supineness in themselves, or by extraordinary exertions in others. It is far from being impossible, that even the south-western parts of Pennsylvania may look down one of these rivers for their supplies of goods manufactured in Europe.

Let the importance attached by men best acquainted with the subject to the commerce of the west attest its value. The exertions which other states appear to be making to secure it, will probably awaken the attention of Virginia to that part of it which should naturally belong to her.

There is still another aspect in which this subject deserves to be viewed.

That intimate connection which generally attends free commercial intercourse, the strong ties which are formed by mutual interest, and the interchange of good offices, bind together individuals of different countries, and are well calculated to cherish those friendly sentiments, those amicable dispositions, which at present unite Virginia to a considerable portion of the western people. At all times the cultivation of these dispositions must be desirable but in the vicissitudes of human affairs, in that mysterious future, which is in reserve, and is yet hidden from us, events may occur to render their preservation too valuable to be estimated in dollars and cents.

The advantages which may result to Virginia, from opening this communication with the western country, will be shared in common with her by the states of Kentucky and Ohio.

Considering it as a medium for the introduction of foreign articles into those states, it has claims to their serious attention.

The proposition that a nation finds its true interest in multiplying its channels of importation, admitting them to be equally convenient, is believed to be incontrovertible. In addition to those arguments in support of this proposition which belong to every case, the situation of the western states suggests some which are peculiar to themselves, and which well deserve their consideration.

The whole of that extensive and fertile country, a country increasing in wealth and population with a rapidity which baffles calculation, must make its importations up the Mississippi alone, or through the Atlantic states. When we take into view the certain growth of the country, we can scarcely suppose it possible that any commercial city on the banks of that river can keep pace with that growth, and furnish a supply equal to the demand. The unfriendliness of the climate to human life, will render this disparity between the commercial and agricultural capital still more sensible. It will tend still more to retard a population of that sound mercantile character, which would render some great city on that majestic river, a safe emporium for the western world.

In times of profound peace, then, the states on the Ohio would make sacrifices of no inconsiderable magnitude, by restricting their importations to a single river. But, in time of war, their whole trade might be annihilated. When it is recollected that the Mississippi empties itself into the Gulph of Florida, which is surrounded by foreign territory; that the island of Cuba and the coast of East Florida completely guard the passage from its mouth

to the ocean; that the immense commerce flowing down its stream, holds forth irresistible allurements to cruizers, the opinion seems well founded, that scarcely a vessel making for that place could reach its port of destination.

But the length of the voyage up the Mississippi and Ohio, must be attended with delay so inconvenient to persons engaged in commerce, as to render a shorter route, though not less expensive, more eligible. For importation of many articles, there is much reason to believe that a decided preference would always be given to the transportation through the United States, were that transportation rendered as easy as it is capable of being made.

The export trade during peace, so far as the articles exported were designed for a foreign market, would, more probably, pass exclusively down the Mississippi. But those articles which are consumed in the United States, as manufactures of hemp, would find their way to market through interior and shorter channels.

If the direct route through the Atlantic states would, for many purposes, be more eligible than that through the Gulph of Florida, which must be often connected with a coasting voyage to or from an Atlantic port, then the multiplication of those routes, if in themselves equal, by presenting a greater choice, and by accommodating more territory, must be desirable.

But your Commissioners are sanguine in the opinion, that the communication through the rivers they have viewed, if properly made, will possess advantages over every other, which cannot fail to recommend it to a large portion of the states of Kentucky and Ohio. All that part of the western country which draws its supplies and transports its produce through the river Ohio, and which lies east of Louisville and west of the Pennsylvania line, perhaps a part of the state of Pennsylvania itself, could probably use this route more advantageously than any other; unless, indeed, that through the Potowmac, connected with Monongehela, Cheat, or Yohaghena, should come into competition with it, for the eastern part of the country just mentioned.

That it would, for the importation of articles from Europe, and from the east, (with a few exceptions) and for the exportation of those which are consumed in the United States, be preferred to the voyage through the Mississippi, unless the introduction of steam boats should essentially vary the present state of things, may safely be assumed from the fact, that a land carriage between Pittsburg and Philadelphia or Baltimore, and a carriage up or

down the Ohio, are now used for the purposes described, in preference to the route by New Orleans.

The present price for the transportation of goods from Philadelphia or Baltimore to Pittsburg, is understood to be from seven to ten dollars per hundred weight.

The price of transportation from Richmond, up James-river to the mouth of Dunlap's-creek, thence across the Alleghany to Greenbrier, and down to the mouth of the Great Kanhawa, will certainly depend on the goodness of the road and the degree of perfection to which the navigation may be carried. Your Commissioners believe that a sound national economy would dictate such improvements as would reduce the price of freight, although the labor employed in making them might be procured by an augmentation of toll, and some expenditure of public money.

Should the navigation of James-river be rendered as safe and as easy as may be reasonably expected, and the Greenbrier and New-river be improved, in such manner as the object will justify, your Commissioners believe they hazard nothing in saying, that the expense of transporting one hundred weight from Richmond to the mouth of the Great Kanhawa, will not exceed half the price of transporting the same weight from Baltimore or Philadelphia, to the same place.

The immense works meditated in New York, will certainly, if executed, give to that state great advantages in a competition for the trade of the lakes. But if other convenient and more direct channels be opened, it is not probable that the commerce of the Ohio will take the circuitous route by the lakes.

The expense of transportation from New York through the canal contemplated, can only be conjectured. The character of the rivers which would be used, is not well understood, but they must possess many advantages to give them a preference over the direct way through Virginia to the Ohio.

Your Commissioners, however, take the liberty to repeat, that the success of any attempt to obtain that share of the commerce of the west, to which this state, from her geographical situation and her rivers, would seem to be entitled, must depend entirely on the safety and cheapness of her navigation. A mode of transportation by water in itself insecure, or so laborious as to be little less expensive than carriage by land, will never change the channels in which this trade already flows.

The advantages to accrue to the United States, from opening

this new channel of intercourse between the eastern and the western states, are those which necessarily result to the whole body from whatever benefits its members, and those which must result to the United States, particularly from every measure which tends to cement more closely the union of the eastern with the western states.

In those operations, too, which the exigencies of government may often require, this central channel of communication by water may be of great value. For the want of it, in the course of the last autumn, government was reduced to the necessity of transporting arms in waggons from Richmond to the falls of the great Kanhawa. A similar necessity may often recur.

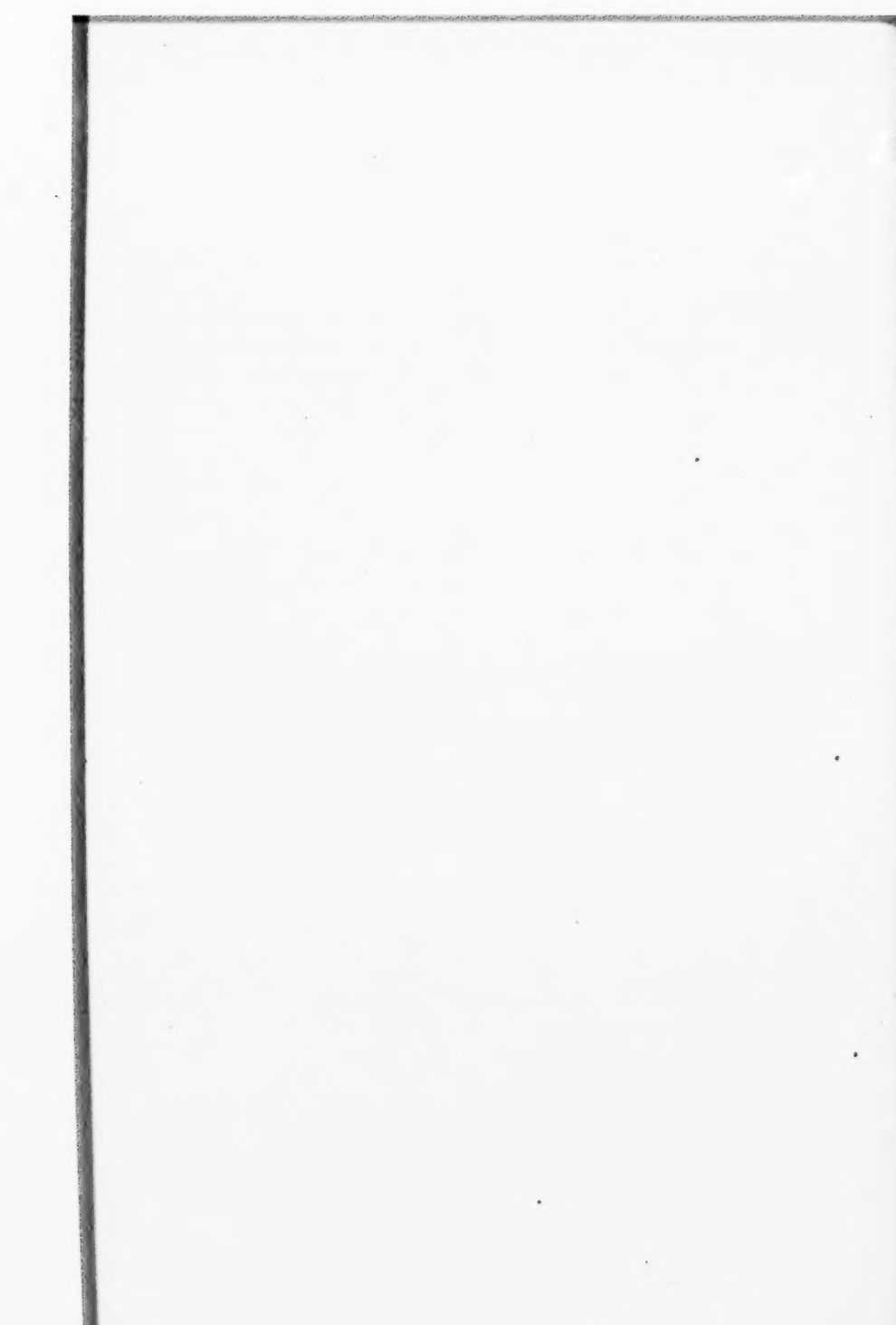
All which is respectfully submitted to the General Assembly,
by

JOHN MARSHALL,
JAMES BRECKENRIDGE,
WILLIAM LEWIS,
JAMES M'DOWELL,
WILLIAM CARUTHERS,
ANDREW ALEXANDER.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Order Amending Decree of Reference.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

NO. 4, ORIGINAL.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA.

ORDER AMENDING DECREE OF REFERENCE.

On consideration of the motion to modify the decree of reference herein,

IT IS NOW HERE ORDERED BY THE COURT that said motion be, and the same is hereby, sustained so far as to make the first line of paragraph 2 read "The extent and assessed valuation," and in all other respects that said motion be, and the same is hereby, denied.

June 1, 1908.

A true copy.

Test:

JAMES H. MCKENNEY.

(SEAL)

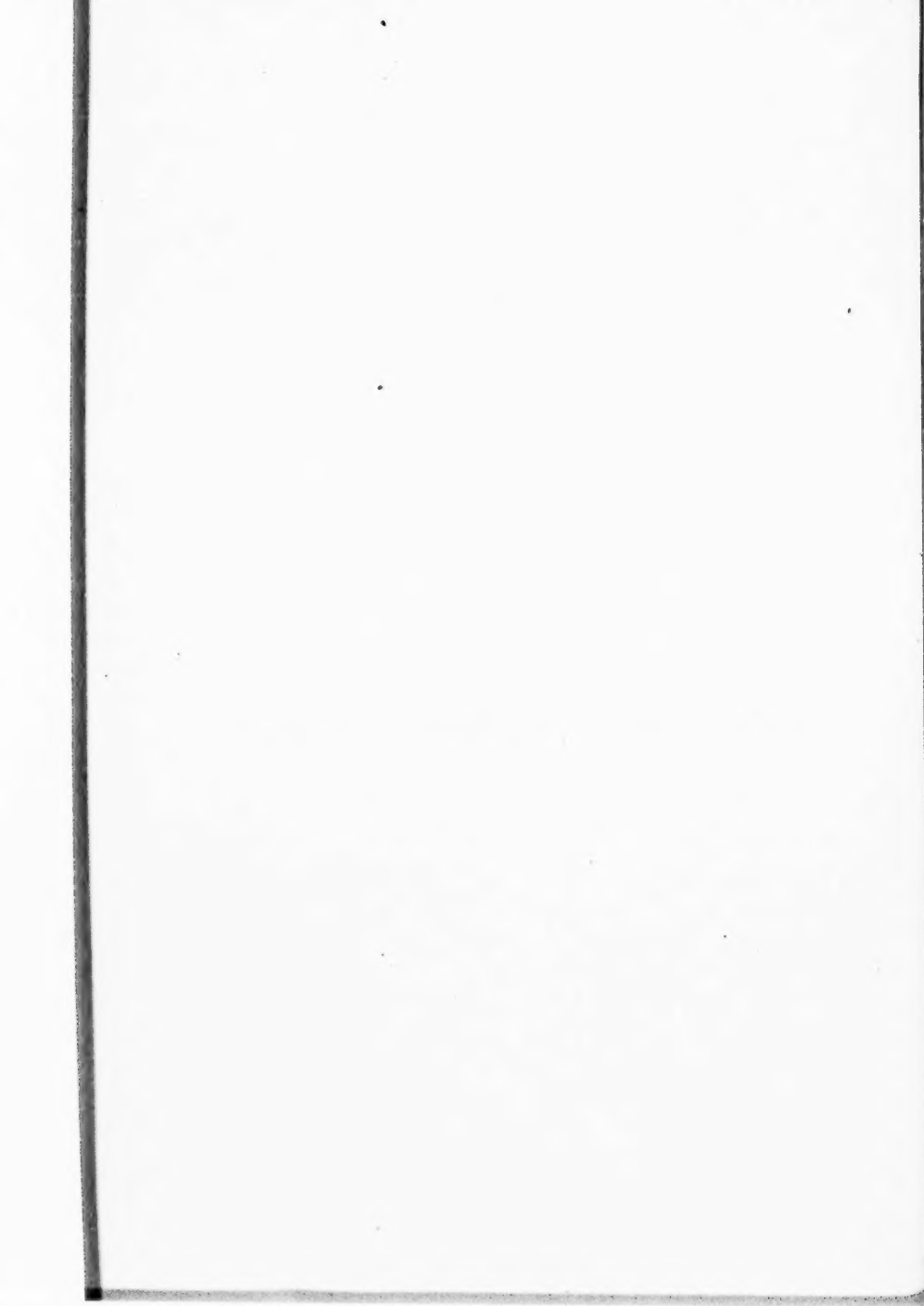
Clerk of the Supreme Court of the United States.



Supreme Court of the United States.

OCTOBER TERM, 1907.

Order Appointing Special Master.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

NO. 4, ORIGINAL.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA.

ORDER APPOINTING SPECIAL MASTER.

It is ordered by the Court that MR. CHARLES E. LITTLEFIELD, a member of this Bar, be, and he is hereby, designated and appointed as Special Master under the decree entered herein on May 4, 1908.

June 1, 1908.

A true copy.

Test:

JAMES H. MCKENNEY,

(SEAL)

Clerk of the Supreme Court of the United States.

